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Supreme Court, U.S.
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No. 91-___

In The

Supreme Court of the United States

October Term, 1991

RICHARD A. CURRY,

Petitioner,

versus

NASCO, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should district courts have authority to resort to inherent power to sanction conduct that consists solely of filings, and, if so, should the district court be required to identify the circumstances which compelled resort to inherent power?

2. Should district courts be required to identify the specific acts which support the imposition of a sanction under inherent power and should the district courts be required to identify the particular authority or authorities upon which the court relies in imposing such a sanction?

3. Is an attorney threatened with suspension from the practice of law entitled to a hearing in which all the factual evidence is substantively considered and an appeal in which the factual basis for the sanction is substantively reviewed?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties in the courts below:

Calcasieu Television & Radio, Inc.,

G. Russell Chambers

Mabel Christine Baker, Trustee

Gary Boland

Andrew J. Gray, III

Edwin A. McCabe

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Richard A. Curry ("Curry") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW[1]

The initial opinion of the district court is reported at 124 FRD 120 (WD La 1989) (Appendix A-1), hereinafter App. A-"___"). The initial opinion of the court of appeals is reported at 894 F2d 696 (5 Cir 1990) (App. A-64) The *per curiam* opinion by the court of appeals on Petitions for Rehearing and Suggestions for Rehearing En Banc is not reported (5 Cir February 6, 1990). (App. A-92) The ruling of the district court is not reported (WD La August 18, 1990). (App. A-94) The ruling of the district court (for an *en banc* reconsideration) is not reported (WD La September 27, 1990). (App. A-104) The *per curiam* opinion of the court of appeals is not reported (5 Cir September 13, 1991) (App. A-164), nor is the Judgment as rendered in connection therewith reported (5 Cir September 13, 1991). (App. A-201) The *per curiam* opinion of the court of appeals on Petition for Rehearing is not reported (5 Cir October 15, 1991). (App. A-176)

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[1] Other opinions in this case, but not pertinent here, are: *NASCO, Inc. v Calcasieu Television & Radio, Inc.*, 752 F2d 157 (5 Cir 1985); *NASCO, Inc. v Calcasieu Television & Radio, Inc.*, 623 FSupp 1372 (WDLa 1985); and *NASCO, Inc. v Calcasieu Tele/ Radio*, 797 F2d 975 (5 Cir 1986).

Another opinion in this case, which is pertinent here, is *Chambers v Nasco*, 501 US ___, 115 LEd2 27, 111 SCt 2123 (1991). *See* Appendix A-111.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1991. A timely petition for rehearing was denied on October 15, 1991. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

APPLICABLE PROVISIONS INVOLVED

1. Rule 11 of the Federal Rules of Civil Procedure

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its

> own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

2. The inherent power of a court.

STATEMENT OF THE CASE

A. Course of The Proceedings

This case involves a sanction imposed against an attorney, Richard A. Curry ("Curry") under the court's "inherent power." The sanctioned activity consisted only of pleadings filed by Curry in connection with a trial that was completed in April, 1985. Sanctions were not even sought against Curry until more than two and one half years later.

This action was instituted by NASCO, Inc. ("NASCO") on October 17, 1983 in the United States District Court for the Western District of Louisiana. The defendants were Calcasieu Television and Radio, Inc. ("CTR") and its director and sole shareholder, G. Russell Chambers ("Chambers"). The complaint sought specific performance of a purchase agreement and compensatory and punitive damages. A temporary restraining order issued on October 17, 1983, and a preliminary injunction issued on October 24, 1983, enjoined CTR and Chambers from alienating or encumbering properties covered by the purchase agreement.

On October 24, 1983, an Amended complaint was filed by NASCO against Mabel Christine Baker ("Mabel Baker") as Trustee of the Facility Trust. The Amended complaint alleged that Mabel Baker had conspired with CTR and Chambers to deprive NASCO of its property

rights. The Amended complaint sought an order requiring Mabel Baker to reconvey property to CTR and also sought compensatory and punitive damages from Mabel Baker in the amount of THIRTY MILLION DOLLARS ($30,000,000).

After substantially all of the discovery had been completed and shortly before trial, NASCO voluntarily moved to dismiss its claim for monetary damages against all of the defendants, including the $30,000,000 monetary damage claim against Mabel Baker.[2] The district court granted NASCO's motion on February 15, 1985 and ordered that the trial be "limited to the remedy of specific performance for breach of contract and the defenses applicable thereto." Trial was held in Lake Charles, Louisiana on April 17 and 18, 1985.

On November 27, 1985, the district court entered judgment in favor of NASCO. The judgment required Chambers and CTR to perform the purchase agreement and contained other orders to effectuate the judgment of specific performance.

On August 6, 1986 the United States Court of Appeals for the Fifth Circuit affirmed the trial court's judgment on the merits. Having found the appeal to be without merit, the Court imposed sanctions against the parties and remanded the case for a determination of whether sanctions should be imposed against the defendants or their counsel under Federal Rules of Civil Procedure 11 or 28 USC § 1927 "as it relates to the proceedings in the district court." No sanctions were ever imposed under Rule 11 or this statutory provision.

Other proceedings upon remand did not involve Mabel Baker or her counsel, Curry. These proceedings

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[2] NASCO moved to dismiss its monetary claims against Mabel Baker on February 8, 1985. At that time, trial was scheduled to begin on February 27, 1985. On February 21, 1985, the court continued the trial until April 17, 1985.

continued over a period of almost a year and a half, culminating with the transfer of the property to NASCO in late 1987. On December 29, 1987 NASCO filed a Motion to Fix Compensatory Damages Pursuant to Contempt Judgment, to Fix Appellate Sanctions, and to Impose Sanctions. (App. A-178) Named as respondents were Chambers, A.J. Gray ("Gray"), Edwin McCabe ("McCabe"), Gary Boland ("Boland"), Mabel Baker and Curry. Gray, Boland and McCabe had represented Chambers and CTR at various times in these proceedings. Curry had represented only Mabel Baker.

The trial court held a hearing on the Motion for Sanctions on April 11, 1988. Eight months later, on December 12, 1988, the trial court requested additional authorities from the parties and for the first time (more than three and one-half years after the trial) raised the possibility that suspension or disbarment might be sought against attorneys' involved in the litigation.

By Judgment rendered on January 23, 1989, the trial court assessed appellate sanctions against Chambers in the amount of $66,286.65 and also assessed separate sanctions against Chambers in the amount of $996,644.65. *NASCO, Inc. v Calcasicu Television and Radio, Inc.*, 124 FRD 120, 146 (WD La 1989). (App. A-61) Mabel Baker was reprimanded but neither monetary nor any other sanction was imposed. Gray was prohibited from practicing law in the Western District of Louisiana for a period of three years. McCabe was declared ineligible to practice in the Western District of Louisiana for five years. Curry was suspended from practice in the Western District of Louisiana for a period of six months. No sanction was imposed against Boland.

The trial court's judgment was appealed by Chambers, CTR, Gray, McCabe and Curry. On February 6, 1990, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the sanctions imposed against Chambers,

CTR, Gray and Curry. NASCO, Inc. v Calcasieu Television and Radio, Inc., 894 F2d 696 (5 Cir 1990). (App. A-64) The sanction imposed against McCabe was remanded with instructions for the trial court to reconsider the severity of the sanction imposed against McCabe.[3]

On February 20, 1990, Curry filed an application for panel rehearing before the Fifth Circuit. In a per curiam opinion issued on May 4, 1990 the Fifth Circuit remanded the case, as to Curry only, to the district court for reconsideration. (App. A-92) The remand directed the trial court to conduct a further hearing and reconsider whether sanctions should be imposed against Curry.

After the Fifth Circuit's remand, the trial court set a hearing on July 6, 1990, at which time Curry introduced uncontradicted testimony and produced other uncontested evidence in opposition to the motion for sanctions. By ruling dated August 18, 1990, the district court reinstated its original judgment suspending Curry from the practice of law in the Western District of Louisiana for a period of six months. (App. A-94) Curry filed a motion for reconsideration of the trial court's August 18, 1990 ruling. The motion was denied by ruling dated September 27, 1990. (App. A-104) In both opinions on remand, the trial court expressed its belief that the sanction against Curry had already become final prior to remand.

Curry appealed to the United States Court of Appeal for the Fifth Circuit. On September 13, 1991, the Fifth Circuit affirmed. (App. A-104) Curry's timely application for rehearing was denied on October 15, 1991. (App. A-176)

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[3] Chambers and CTR then filed a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and certiorari was granted. 498 US ___, 112 LEd2d 15, 111 SCt 38 (1990). By a divided 5-4 opinion this Court affirmed the opinion of the Fifth Circuit, *Chambers v Nasco*, 501 US ___, 115 LEd2d 27, 111 SCt 2123 (1991). (App. A-111)

Federal jurisdiction in the first instance was invoked under the diversity provisions of 28 USC § 1332.

B. History of the Case

On August 9, 1983, NASCO, as buyer, with CTR and Chambers, as sellers, entered into a contract ("Purchase Agreement") concerning the television facilities and the broadcast license of KPLC-TV in Lake Charles, Louisiana. Chambers subsequently decided to risk exposure to substantial monetary damages rather than transfer title to NASCO.

On October 16, 1983, Chambers, as settlor, executed an Act of Donation in Trust and appointed Chambers' sister, Mabel Christine Baker, as Trustee. The trust beneficiaries were Chambers' three children. That same day CTR executed a warranty deed which purported to convey to Mabel Baker, as Trustee, certain immovable property upon which the television facilities were located.

At 8:30 a.m., on October 17, 1983, CTR recorded the warranty deed. Later that morning, counsel for NASCO appeared before the trial judge and filed a complaint against Chambers and CTR. The complaint sought, inter alia, specific performance of the Purchase Agreement and a temporary restraining order to enjoin CTR and Chambers from alienating or encumbering properties covered by the Purchase Agreement.

That evening Mabel Baker signed a formal acceptance of the trust and a promissory note in the amount of $1,400,000 representing the purchase price of the property being acquired by the Trust. At the time Mabel Baker executed these documents she had no knowledge of the existence of the Purchase Agreement, much less that NASCO had filed litigation against CTR and Chambers.

Curry did not participate in any of the foregoing actions. Curry did not even have knowledge of these actions until after they occurred. On October 24, 1983

(*after* the trust had been created and the property conveyed) Curry was first contacted by Gray and informed that Mabel Baker was or might become a party in this action and that Mabel Baker might contact Curry to represent her.

At Mabel Baker's request, Curry agreed to represent her. Curry's involvement in the litigation was minimal, particularly given the nature and magnitude ($30,000,000) of the claims asserted against his client. Curry did not file any counterclaim or any other incidental demand against any party; Curry instituted virtually no discovery; and Curry's participation in discovery instigated by other parties was minimal.

REASONS FOR GRANTING THE PETITION

This petition should be granted in order to clarify the relationship between inherent power and Rule 11 and in order to elucidate the due process protection available to attorneys and litigants responding to the exercise of a court's inherent power. Petitioner was sanctioned under the court's inherent power for conduct which – if sanctionable at all – would have been entirely under Rule 11. Petitioner was sanctioned under the court's inherent power even though no court has identified the specific actions by petitioner upon which the sanction was based, and even though petitioner was denied any meaningful review –-either in the trial or appellate court – of the factual basis for the imposition of sanctions.

This Court's June 6, 1991 *NASCO* opinion recognized that a court's inherent power can be employed to sanction filings that are "intertwined within conduct that only the inherent power could address." 111 SCt at 2136. (App. A-131) This petition, by contrast, deals solely with conduct expressly covered by and reachable under Rule 11.[4]

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[4] The majority opinion in *NASCO* states that "when there is bad-faith conduct in the course of litigation that could be

(Continued on following page)

This case squarely presents the issue that was not addressed in this Court's June, 1991 *NASCO* opinion: can inherent power be used to sanction conduct that consists solely of filing pleadings, and, if so, must the trial court explain why resort to inherent power is necessary? It is appropriate to resolve this issue here, in the same case that gave rise to the June 6th *NASCO* opinion, for the petitioner, Curry, engaged only in actions that were expressly covered by Rule 11.

The Broad powers of federal courts to control parties and lawyers under rules and statutes[5] are subject to carefully drawn criteria that balance the need of the courts to exercise control while at the same time allowing lawyers to zealously advocate legal issues to protect their clients' interests. This Court's June 6, 1991 *NASCO* opinion gives no specific guidance either to lower courts or to the attorneys who practice before them about the parameters of inherent power or about what conduct and actions (other than those taken in bad faith) may be punishable under inherent power. The June 6, *NASCO* opinion is

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adequately sanctioned under the rules, the court ordinarily should rely on the rules rather than inherent power." 111 SCt at 2136. (App. A-131) The dissent stated that reliance on inherent power to address activity covered by the Federal Rules "encourages all courts in the federal system to find bad-faith misconduct in order to eliminate the need to rely on specific textual provisions . . . [and ensures] the uncertain development of the meaning and scope of these express sanctioning provisions by encouraging their disuse. . . . " 111 SCt at 2145. (App. A-157)

[5] 18 USC §401; 28 USC §1912; 28 USC §1928; Fed. Rule Civ. Proc. 11; Fed. Rule Civ. Proc. 16(f); Fed Rule Civ. Proc. 30(g); Fed. Rule Civ. Proc. 37(d) and (g); Fed Rule Civ. Proc. 41(b); Fed. Rule Civ. Proc. 45(f); Fed Rule Civ. Proc. 56(g); Fed. Rule Civ. Proc. 81; and Fed. Rule App. Proc. 38.

silent on the kind of hearing and appellate review that must be afforded when the basis of the sanction is the all-encompassing inherent power of the court.

These issues deserve clarification, rather than awaiting a dispute between the circuits to arise, in order that courts, litigants and attorneys around the country can avoid the type of satellite litigation that Rule 11 has spawned, and in order to provide specific guidelines and uniform criteria throughout the country on use of inherent power.

Curry was defending a client who had no evil or ulterior motive.[6] At the time Curry was retained, sanctionable conduct had already been committed by other unrelated counsel. After Curry's involvement in the litigation had ceased, sanctionable conduct occurred both in and out of court by other, unrelated counsel and by other defendants.[7] Curry took no part and had no role in this conduct.

Throughout these sanction proceedings, Curry has sought independent review of *his* actions. No such review has occurred, despite two hearings in the trial court, and two appeals. Curry's failure to achieve a meaningful review can be summarized as follows:

> 1) At the initial hearing, Curry was lumped together indiscriminately with the others who were sanctioned. His conduct (limited to filing pleadings) was not separately evaluated, he was not given notice of *his* actions that were sought to be sanctioned, and the trial court improperly confused what Curry did with the actions of the culpable defendants. (124 FRD at 159) (App. A-134-137).

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[6] Trial court conceded that Mabel Baker did not act in subjective bad faith. [124 FRD at 144] (App. A-67).

[7] See Page 13 fn. 10, *infra*.

2) At the first hearing before the Fifth Circuit, Curry's actions were not separately evaluated. (894 F2d at 706-8)(App. A-86 to A-90) On rehearing, the Fifth Circuit realized that Curry may not have received a chance to rebut the complaints that were specific against him and remanded the case back to the trial court. (App. A-93)

3) On remand, the trial court erroneously believed that its prior sanction had been upheld and was final, (App. A-106, 107, 108) and thus treated the remand as an opportunity for Curry to plead for mercy rather than as an independent hearing. At the remand hearing Curry affirmatively rebutted every allegation made against him in the trial court's first opinion. The trial court, however, not only upheld its prior ruling as "final," it cited an alleged additional reason to support sanctions (the Rules of Professional Conduct), although Curry was given no prior notice that this might be an issue, and although these Rules were not adopted in Louisiana until well after the pleadings were filed by Curry. (App. A-100)

4) On further appeal (App. A-164) and the rehearing that followed (App. A-176), the Fifth Circuit refused to separately evaluate either the factual record or the legal conclusions of the trial judge, erroneously believing that it was "bound" by both the "manifest error" rule and the "law of the case." (App. A-171)

All Curry did in this case was to file pleadings. He took no part in the conduct that has been characterized as the "initial fraud" (124 FRD at 125-27)(App. A-10 to A-15) and was not even involved in the case at that time. Inherent power should be used sparingly when only pleadings are involved, and even then should not be used to impose sanctions unless and until the trial court has both articulated why Rule 11 is not sufficient to reach the

pleadings complained of and given the respondent specific notice of the conduct for which sanctions may be imposed. Further, the respondent must be afforded a hearing to defend against the allegations, at which hearing, uncontradicted evidence should be given due evidentiary weight.

Given the chilling effect on zealous advocacy that inherent power sanctions can have; given the fact that, but for the *legal* defense that Mr. Curry asserted on behalf of his client[8], a default judgment of $30 million could have been taken against his client; and given the fact that a defendant with no ill motive certainly should be entitled to a defense against a $30 million claim,[9] it is important to all those who practice before federal courts that this Court resolve the unanswered questions left in the wake of its June, 1991 *NASCO* opinion. It is crucial for Mr. Curry.

Inherent Power Should Not Be Used To Sanction Actions Which Consist Entirely Of Filings

The minimal actions of Curry identified by the trial court and by the Fifth Circuit consisted exclusively of filing pleadings, actions which could and should have been reviewed by reference to the standards established for imposition of sanctions under Rule 11. The trial court and reviewing courts (including this Court's June, 1991 *NASCO* opinion) *did* cite a number of actions in this litigation which would *not* be covered by Rule 11, but

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[8] Curry did not dispute any of the factual issues; the defense asserted in his pleadings on behalf of his client, who was facing a $30 million damage claim, was purely on the legal effects as to the facts that already had taken place prior to Curry's engagement in the case.

[9] Curry testified unequivocally the legal defense he asserted on behalf of his client was in good faith; this testimony was uncontradicted and was supported by affidavits.

these actions were taken by defendants or attorneys *other than Curry.*[10] It has never been alleged, however, that Curry participated, directly or indirectly, in any such activities, and Curry in fact had no such participation. Although the only actions of Curry involved the small number of pleadings,[11] the trial court proceeded to exercise its inherent power to suspend Curry from the practice of law.

This Court affirmed the imposition of sanctions against Chambers under inherent powers because "much of the bad-faith conduct by Chambers . . . was beyond the

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[10] This Court expressly found:

> "Much of the bad-faith conduct by Chambers, however, was beyond the reach of the rules, his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the rules was intertwined within conduct that only the inherent power could address."

111 SCt at 2136. (App. A-131) The trial court cited a number of sanctionable acts by the other attorneys which did not involve pleadings. For example, prior to Curry being retained by his client, Gray was found to have misused the injunction notice given by NASCO in order to devise a scheme to deprive the court of jurisdiction. The trial court found that Gray failed to disclose essential and pertinent facts, actively misled the Court, and surreptitiously recorded a telephone conversation with the Court. 124 FRD at 144 (App. A-57 to A-59). Similarly, after Curry ceased to be involved in the litigation, the trial court found that McCabe had advised Chambers to remove equipment subject to the NASCO purchase agreement in direct contradiction of the trial court's orders and that McCabe had elicited perjured testimony in hearings before the trial court. 124 FRD at 144 (App. A-59 to A-61). None of these allegations pertain to or involve Curry in any fashion.

[11] Curry submitted only 23 filings in the trial court out of a total 446 trial court filings.

reach of the rules . . . " The trial court's use of inherent power to sanction Curry, however, was a reaching out, beyond the substantive and procedural limitations established for Rule 11, to sanction conduct that is expressly addressed by Rule 11.

The Fifth Circuit's original opinion expressly declined to decide whether a district court should be permitted to exercise its inherent power to sanction conduct which is expressly included within the reach of Rule 11: "We express no opinion whether, when the conduct is within the reach of either [Rule 11 or §1927], the court may exceed these boundaries under the auspices of its inherent power." *Nasco, Inc. v Calcasieu Television & Radio, Inc.*, 894 F2d 696, at 702 (5 Cir 1990). (App. A-75) *This is however, exactly the issue presented in reviewing Curry's role in the litigation.* In granting a rehearing and ordering a remand as to Curry, the Court of Appeals expressly recognized Curry's argument that he had only signed pleadings. (App. A-93)

In its opinion following remand, however, the Fifth Circuit, in a footnote, indicated that Curry's counsel during oral argument had withdrawn the issue of whether the court had authority to impose sanctions against Curry under its inherent power.[12] This is an overstatement of Counsel's concession. Curry's appellate brief had argued that pleading violations cannot be sanctioned under inherent power – that Rule 11 preempted the area. It is this argument (Rule 11 preemption) that was abandoned

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[12] The Court of Appeals cited this Court's June 6 *NASCO* opinion as authority for the statement that a "court's inherent power to impose sanctions for bad-faith conduct is not displaced [i.e. preempted] by sanction scheme of statute and rules". (App. A-168 fn. 2) The Court of Appeals did not address whether the trial court should be authorized to resort to inherent power to address conduct which is entirely reachable by the "sanction scheme of statute and rules".

in oral argument, for this Court's June, 1991 decision in *NASCO* (rendered after Curry's appellate briefs were filed) made it clear that inherent power can be used to sanction actions that involve both pleading and non-pleading violations. After this Court's *NASCO* ruling, Curry argued that, in light of *NASCO*, inherent power should not be used to sanction activity with consists *exclusively* of pleadings unless the trial court expressly finds that Rule 11 is inadequate.

This Court's June 19, 1990 *NASCO* Opinion found that a litigant's activities which consisted of *both* filing and non-filing violations could be addressed under the Court's inherent power: "At the very least, the inherent power must continue to exist to fill in the interstices." 111 SCt 2123 at 2134. (App. A-126) No court, however, has found any specific conduct by Curry which, if sanctionable at all, could not be reached under Rule 11. As to Curry, at least, there were no "interstices."

This Court also emphasized, moreover, that "when there is bad faith conduct in the course of litigation that could be adequately sanctioned under the rules, the Court ordinarily should rely on the rules rather than the inherent power". 111 SCt 2123 at 2136. (App. A-131) None of the courts below have suggested why Rule 11 was not "up to the task" of addressing *Curry's* conduct so as to justify resort to inherent power.

The courts below have not cited any extraordinary circumstances that would warrant exercise of inherent power against Curry. The only "unusual" circumstance of the sanction against Curry is the fact that, given the egregious actions of the other parties, the factual investigation and proceedings against Curry were improperly intertwined with the filing and non-filing activities of others. Guilt by association, however, is not the sort of unusual circumstance that justifies a court's resort to inherent power to sanction actions that clearly consisted only of pleadings reachable by Rule 11.

A judge should not be able to impose inherent power sanctions for actions limited to pleadings without expressly finding and stating why Rule 11 is an inadequate standard. To not use this criteria produces inconsistent results[13] and undercuts the carefully crafted rules established for Rule 11 proceedings. These rules are meaningless if trial courts can avoid these standards by referring to "inherent power". *See NASCO*, 111 SCt at 2145, dissenting opinion. (App. A-154)

This case, therefore, squarely presents the issue that was not present in the June, 1991 *NASCO* opinion of this Court – use of inherent power to sanction only pleadings. The boundary (or overlap) between a court's inherent power and the authority expressly granted by the Federal Rules has been the subject of considerable discussion. *See Foster v Mydas Associates, Inc.*, 943 F2d 139, 141 (1 Cir 1991); *Bakker v Grutman*, 942 F2d 236, 242 (4 Cir 1991); *Landon v Hunt*, 938 F2d 450 (3 Cir 1991); *R.W. International Corp. v Welch Foods, Inc.*, 937 F2d 11, 20 (1 Cir 1991); *Matter of Case*, 937 F2d 1014 (5 Cir 1991); *Homico Construction & Development Company v Ti-Bert Systems, Inc.*, 939 F2d 392, 395 (6 Cir 1991), dissenting opinion. All of these cases have cited this Court's June 1991 *NASCO* decision. *See* also *The Supreme Court – Leading Cases*, 105 Harvard Law Review 177, November 1991:

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[13] For example, the Advisory Committee Notes on Rule 11 emphasize the need to quickly address and prevent an "accumulation" of Rule 11 sanctions and the importance of avoiding "satellite litigation". Advisory Committee Notes, 97 FRD 165 (1983). These goals are obviously frustrated in the present litigation. The trial in the district court took place four years prior to the trial court's sanction decree and NASCO had not even filed its sanction motion until almost one and one-half years after the Fifth Circuit affirmed the district court's judgment on August 6, 1986. (App. A-178)

> The Court's unfortunate decision [*NASCO*] invites district courts to forego the application of express sanctioning rules, a development that would retard the refinement of federal sanctioning jurisprudence and frustrate meaningful appellate review of sanctioning decisions.

Id. at 350.

> This necessity prerequisite is not simply a doctrinal guidepost; it is essential because it delimits the vague boundaries of the inherent power to sanction for bad faith litigation conduct. So limited, this inherent power gives a court the authority – and only the authority – to sanction otherwise unpunishable conduct when a court's ability to perform its judicial function is threatened. Equally important, the necessity requirement prevents courts from invoking inherent authority to bypass democratically approved sanctioning rules. Properly understood, the inherent power to sanction thus is residual and can arise only after all other sanctioning tools have proven inadequate.
>
> On a more concrete level, a requirement that express rules be exhausted would foster the development of a well articulated jurisdprudence for the congressionally authorized sanctioning mechanisms. The 1983 Amendments to the Federal Rules of Civil Procedure were adopted specifically to equip federal courts with powerful tools to deter abusive litigation practices and go so far as to cast some amendments in mandatory terms to prevent courts from hesitating to punish meritless claims. By allowing a district court to abandon these rules in favor of inherent authority even when the Rules apply, the Court risks halting the evolution of precedents defining the proper application of express sanctioning provisions. These decisions provide valuable guidance to lower courts and give parties notice of the standards by which they must conduct their litigation.

> Similarly, a well developed body of precedent, coupled with the textual standards articulated in express sanctioning provisions, would allow for more meaningful appellate review for sanctioning decisions. Levies of sanctions should be scrutinized carefully to ensure that "abuse of discretion" level of review for inherent sanctions will be toothless unless a reviewing court can analyze whether specific legal standards have been misapplied. These legal standards would better protect litigants against capricious assessment of fines, especially litigants advancing unpopular or controversial arguments. [Footnotes omitted.]

Id. at pages 356-357.

Some decisions rendered after the June, 1991 NASCO decision have recognized that a court's inherent power is only available "in imposing sanctions *unreachable* by Rule 11 or Section 1927." (emphasis added). *Bakker v Grutman*, 942 F.2d at 242, n.7 (4 Cir. 1991). Similarly, *McGill v Duckworth*, 944 F2d 344 (7 Cir. 1991) (which did not involve sanctions) noted:

> "Although federal judges have some 'inherent powers', these are limited by statutes and rules. [citing this Court's opinion in *NASCO*]. Relying on 'inherent powers' to compel the attendance of a witness who is outside the court's subpoena would make the restriction in Rule 45(e) meaningless."

Id. at 354. If district courts are authorized to resort to inherent power to sanction conduct which is entirely reachable under Rule 11, then the limitations of Rule 11 would likewise become meaningless.

Curry was retained by a trustee who had been sued personally for $30 million. Curry filed pleadings to state a defense to the $30 million claim. Had Curry *not* filed a defense, a $30 million judgment by default or summary judgment could have been obtained against Mabel Baker.

When the actions sought to be sanctioned consist solely of pleadings, then only Rule 11 should be used. If unusual circumstances require use of inherent power, then the court should give the respondent advance notice of the specific pleading *and* non-pleading actions sought to be sanctioned, notice of why the court believes Rule 11 is insufficient to reach the actions complained of, and the respondent should be given an adequate opportunity to defend against the specific allegations.

Suspension From Practice Is A Drastic Penalty Which Can Only Be Imposed After: (a) The Attorney Is Provided Notice Of The Specific Acts For Which Sanctions Could Be Imposed; And (b) The Attorney Is Afforded A Hearing And Appellate Review Of The Factual Basis For The Sanctions.

Over one hundred years ago this Court recognized the severe nature of proceedings that deprive an attorney of the right to practice law. *Ex Parte Robinson*, 88 US 505, 19 Wall 505, 22 LEd 205 (1875).[14] The same rationale and criteria apply to the sanction of suspension, for both suspension and disbarment deprive an attorney of the

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[14]" '[Attorneys] hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.' Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property." *Ex parte Robinson*, 88 US 505 at 512, 19 Wall 505, 22 LEd 205 (1874) (quoting *Ex parte Garland*, 4 Wall 378 (1867)).

right to practice his profession;[15] are quasi-criminal in nature;[16] and have a drastic impact on a lawyer's livelihood, reputation and standing in the community. *See, e.g., Erdmann v Stevens*, 458 F2d 1205, 1210 (2 Cir 1972). The Fifth Circuit never addressed Curry's fundamental complaint that he was not given notice of the specific actions – by Curry – for which sanctions were being imposed.

Because the sanction of suspension from practice should be imposed for only the most severe offenses before a court, it follows that the sanction should only be imposed if the lawyer (a) has received notice, prior to hearing, of specific conduct or activities for which sanctions are being contemplated;[17] and (b) has been afforded a hearing on the factual basis for the sanction, a hearing subject to appellate review. These basic due process requirements were not afforded to Curry.

(a) Curry Was Not Given Specific Notice Of The Activities For Which He Might Be Sanctioned.

The imposition of sanctions under Rule 11 is subject to carefully crafted limitations and conditions.[18] A

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[15] Suspension, like disbarment, has a "domino effect" triggering action in every other court before which the lawyer is licensed to practice. This certainly is the case in the courts in which Curry practices.

[16] *In Re Ruffalo*, 390 US 544, 20 LEd2d 117, 88 SCt 1222, 1226, reh'g. den. 391 US 961, 20 LEd2d 874, 88 SCt 1833, amended, 392 US 919, 20 LEd2d 1380, 88 SCt 2257 (1968).

[17] *Roadway Express, Inc. v Piper*, 447 US 752, 65 LEd2d 488, 100 SCt 2455 (1980) ("fair notice" is required before sanctions are assessed).

[18] *See, Business Guides, Inc. v Chromatic Communications Enterprises, Inc.*, 498 US ___, 112 LEd2d 1140, 111 SCt 922 (1991); *Pavelic & LeFlore v Marvel Entertainment Group*, 493 US ___, 107 LEd2d 438, 110 SCt 456, (1989); *Doering v Union County Board of Chosen Freeholders*, 857 F2d 191 (3 Cir 1988); *Thomas v*

(Continued on following page)

Court's inherent power, by contrast, is not subject to these limitations, and an attorney faced with the imposition of sanctions under a court's inherent power does not have the benefit of the safeguards implicit in these limitations. Some members of this Court have cautioned against a "standardless exercise of judicial power",[19] for the only limitation on the district court's exercise of its inherent power recognized by this Court's June 1991 *NASCO* Opinion is a finding that the attorney acted in subjective bad faith. 111 SCt at 2145. (App. A-154) It necessarily follows that, at a minimum, the attorney exposed to sanctions under the court's inherent power must be given specific notice of the activities or standard of conduct upon which the sanction would be based:

> "The notice is particularly pointed in connection with inherent power sanctions since unlike Rule 11 and § 1927, they derive from a common law

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Capitol Security Services, Inc., 836 F2d 866 (5 Cir 1988); *Golden Eagle Distributing Corp. v Burroughs Corp.*, 801 F2d 1531 (9 Cir 1986); *See generally* G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); J. Solov, L. Kaster, N. Hirsch & J. Thompson, Sanctions in Federal Litigation (1991); G. Vairo, Rule 11 Sanctions – Case Law Perspectives & Preventive Measurer (1991); Cochran, Rule 11: *The Road to Amendment*, 61 Miss. LJ 5 (1991).

[19] *NASCO*, 111 SCt at 2145 (App. A-152-153), the dissenting opinion, stated:

> "The Federal Rules establish explicit standards for, and explicit checks against, the exercise of judicial authority. . . . These definite standards give litigants notice of proscribed conduct and make possible meaningful review for misuse of discretion review which focuses on the misapplication of legal standards. . . . "
>
> "By contrast, courts apply inherent powers without specific definitional or procedural limits."

> tradition and are not based upon a statute or rule setting forth the standard of conduct expected of counsel and litigants."

G. Joseph Sanctions: The Federal Law of Litigation Abuse (1989) 400.

This Court's June, 1991 opinion in *NASCO* cautioned that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." 111 SCt at 2132. (App. A-123) Most federal circuits have expressly recognized that a sanction imposed in reliance on a subjective finding of bad faith must carefully delineate the activities upon which the sanction is based and the authority for the sanction. For example, the United States Court of Appeals for the Second Circuit, in *Oliveri v Thompson*, 803 F2d 1265, 1262 (2 Cir 1986) stated that the standard for proof of bad faith under inherent power should be high:

> [W]e have declined to uphold awards under the bad-faith exception absent both "clear evidence" that the challenged actions "are entirely without color, and [are taken] for reasons of harassment or delay or for other improper purposes" and "a high degree of specificity in the factual findings of [the] lower courts." [citations omitted].

The Tenth Circuit, in *Sterling Energy, Ltd v Friendly National Bank*, 744 F2d 1433 (10 Cir 1984) emphasized that conclusory findings of bad faith were not sufficient to support the imposition of sanctions:

> "The trial judge in the present case used the words 'bad faith' in his order. . . . , but that alone does not resolve the issue. The judge failed to tell us upon what factual basis he arrived at the conclusion of bad faith. . . . "

See also Langton v Johnston, 928 F2d 1206 (1 Cir 1991); *Thomas v Evans*, 880 F2d 1235, 1240 (11 Cir 1989); *Kreager v Solomon & Glanagan, P.A.*, 775 F2d 1541, 1543 (11 Cir 1985); *Rothenberg v Security Management Company, Inc.*, 736

F2d 1470, 1472 (11 Cir 1984); *Barnd v City of Tacoma*, 664 F2d 1339, 1342 (9 Cir 1982).

Indeed, federal courts generally have required particularized findings of fact to support sanctions even where bad faith is not an element. The Ninth Circuit in *Matter of Yagman*, 796 F2d 1165, 1188 (9 Cir 1986) stated:

> "The court cannot, as it purported to do, sanction Yagman's 'total conduct' under Local Rule 17.1. . . . Nor can the Court sanction trial conduct under section 1927 without more specific findings as to the exact misconduct which multiplied the proceedings and the amount of 'excess costs, expenses, and attorney's fees' occasioned by the misconduct."

See also Insurance Benefit Administrators, Inc. v Martin, 871 F2d 1354, 1362 (7 Cir 1989); Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 FRD 101, 128-29 (1988).

These notice requirements are even more crucial where, as in the present case, an attorney's right to practice law is at stake, *In Re Ruffalo*, 390 US 544, 20 LEd2d 117, 122, 88 SCt 1222 (1968):

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer, [citations omitted] He is accordingly entitled to procedural due process, which includes fair notice of the charge.
>
> * * *
>
> These are adversary proceedings of a quasi-criminal nature [citations omitted]. The charge must be known before the proceedings commence. They become a trap when after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh."

See also In Re Finkelstein, 901 F2d 1560, 1565 (11 Cir 1990) (Citing *In Re Ruffalo*: "while the conduct of appellant may

have been an act of 'unlawyerlike rudeness' and offensive to the district court, he was not on notice that such conduct would lead to his suspension from the practice of law.").

No Court has afforded Curry a written statement of how the specific acts by Curry (separate and apart from actions of any other respondent) was sanctionable or merited suspension from practice. Such a statement obviously should have preceded the first hearing in the trial court; it has never been afforded Curry.

Citing Curry's "claim that he did not receive an adequate opportunity to defend himself . . . ", (App. A-34),[20] the Fifth Circuit remanded the sanction against Curry for further hearing. At no time following the remand or prior to the hearing after remand did the trial court indicate any new legal or factual grounds for the imposition of sanctions which were to be considered. Therefore, Curry attended the hearing after remand and presented evidence to rebut the conclusory and pejorative statements contained in the original sanctions judgment.

At the remand hearing, however, the trial court clearly believed, and repeatedly asserted, that the sanction had already become final, thereby depriving Curry of any meaningful review of the factual basis for the sanction. The trial court then exacerbated the violation of Curry's rights of procedural due process by finding, *for the first time on remand*, that Curry had breached specified Rules of Professional Conduct – rules which were not even in effect at the time of the alleged sanctionable activity, Art. XVI of LSBA Articles of Incorporation, La RS

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[20] For example, the trial court, without prior notice to Curry, and without any factual basis (in the record or otherwise) characterized Curry as some type of agent or tool of Jack Gray, "contacted/hired directly by Gray to assist and defend the public records doctrine defense . . . " 124 FRD 120 at 133 (App. A-30). Yet, NASCO's motion made no allegation suggesting any improper relationship between Gray and Curry. (App. A-178)

Title 37, Ch. 4 App. (App. A-100) Curry had *never* been given notice that these Rules would be an issue, and Curry was never given notice of how he might have allegedly violated these rules.

While the Court of Appeals later stated that citation of these rules was "simply one of [the trial court's] findings, not an alteration of the basis for the sanctions . . . ", (App. A-171, fn. 3)[21] this conclusion would require that the trial court ruling be reversed, for the trial court *for the first time on remand* made a finding on a new factual issue of which Curry was not given prior notice.

(b) An Attorney Cannot Be Suspended Under A Court's Inherent Power Until After A Hearing To Review The Factual Basis For The Sanction, The Record Of Which Is Subject To Appellate Review.

Even if Curry could be sanctioned under inherent power, such power can only be exercised following a "hearing" for which there is appellate review. In this case, the Fifth Circuit remanded the case to the trial court for an evidentiary hearing. The trial court's opinion following remand, however, gave no weight to the uncontroverted evidence produced.

On May 4, 1990, the United States Court of Appeals for the Fifth Circuit granted Curry a rehearing and

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[21] The Court also suggested that the disciplinary rules – which were not in effect at the time of the alleged sanctionable activity embody essentially the same standards which were embodied in the former Code of Professional Responsibility. The current rules, however, deliberately de-emphasized the attorney's obligation to zealously represent his client. *Compare* former Code of Professional Responsibility, Canon 7, Ethical Consideration 7-3. This is a critical distinction under the facts of the present case, Curry's client was a fiduciary sued for $30 million; the character of Curry's representation was the fundamental issue in the imposition of sanctions against him.

ordered a remand, as to Curry only. This remand specifically ordered an evidentiary hearing, for the issue as to Curry[22] was whether the trial court's 1989 opinion had addressed the factual basis for the imposition of sanctions against Curry. At this stage of the proceeding, it appeared that Curry would finally have the type of evidentiary hearing, as he was always entitled to. At the hearing on remand, Curry presented evidence and witnesses to conclusively demonstrate that no basis for the imposition of sanctions against him existed. While the trial court did allow the form of a hearing to occur, it is clear that the trial court thought this was a mere formality without substance, for it gave no weight to the uncontroverted evidence and stated that its former sanction ruling had already become "final."

The Fifth Circuit opinion following remand acknowledged that the trial court had announced at the beginning of the remand hearing that the sanction had already

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[22] On his original appeal, Curry had argued strenuously that the basis for the imposition of sanctions against him had never been separately considered. Unfortunately, Curry's separate "hearing" on remand was inexplicably combined with a "hearing" to "reconsider" the sanction imposed on A.J. Gray, whose sanction *had* already resulted in a final judgment. The trial court made no distinction between the hearing given Gray (whose sanction was already final) and the hearing accorded Curry (whose sanction was remanded for further evidence to be presented). (App. A-94)

It is ironic that Curry's sanction, which was remanded, was not altered in the face of uncontroverted evidence disproving the factual basis for the sanction, whereas Gray's sanction, which was *not* remanded, was subsequently reduced by one-half because the trial court determined that "the purposes of Gray's suspension by this court have been served". (App. A-175)

become final.[23] (App. A-169) The trial judge's misunderstanding of the Fifth Circuit's remand seems evident from this statement alone. There could be no doubt about the trial judge's perception, for he repeated his belief, in the most emphatic terms, that the judgment had become final. These statements are particularly prevalent in the trial court's ruling denying reconsideration rendered September 27, 1990. (App. A-104) In that ruling the trial judge, on at least four occasions, made his belief clear that rehearing had been *denied* and that the sanctions judgment had become final:

> "The sanction judgment was affirmed February 6, 1990. Curry's Petition for Rehearing was denied on May 4, 1990. . . . " (App. A-105)
>
> "Our sanctions judgment has been appealed and affirmed and petitions for rehearing denied, 'no active member of the court having requested a poll.' " (App. A-106)
>
> "This remand and the appellate court's denial of Curry's plea for rehearing did not disturb the finality of the sanctions judgment any more than the sanctions remand of the same court disturbed the finality of our judgment on the merits. That judgment is final." (App. A-107)

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[23] The Fifth Circuit opinion then quotes Curry's counsel's startled response to the trial judge's pronouncement – which response simply acknowledged that the trial court made such an utterance. It is not clear why the Fifth Circuit quotes counsel's response. Surely, Curry's right to an evidentiary hearing could not have been impaired by counsel's simple acknowledgment of the trial judge's statement. In any event, Curry made it abundantly clear at the hearing and in briefing before and after the hearing (particularly in requesting reconsideration in the trial court) that Curry believed he was entitled to the evidentiary hearing ordered by the Fifth Circuit on remand.

> "The Court of Appeals through its ordinary course of business has now affirmed the sanctions judgment and has denied rehearing." (App. A-108)

These pronouncements are utterly inconsistent with the Fifth Circuit's May 4, 1990 order that explicitly granted a rehearing as to Curry and ordered a remand as to him for a further evidentiary hearing to consider the factual basis for the imposition of sanctions. The trial court's statements show that the trial court did not believe that a rehearing even had been granted; they show that the trial court believed the prior judgment was final.

The Court of Appeal, however, declined to review the basis for the imposition of sanctions against Curry:

> "As stated in the recent opinion in *Chambers*, '[w]e review a court's imposition of sanctions under its inherent power for abuse of discretion.' ___ US at ___, 111 SCt at 2138 (citing *Link v Wabash R.R.*, 370 US 626, 633 (1962)). Obviously, due to the limited nature of the remand, our review is even more narrow in this instance." (App. A-170)

The Fifth Circuit correctly stated the standard of review but then improperly applied it, for this Court has noted in *Cooter & Gell v Hartmarx Corp.*, 496 US ___, 110 LEd2d 359 at 382, 110 SCt 2447, at 2461 (1990):

> "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."

In the present case, the district court clearly erred in its view of the law (the court erroneously believed that the sanction had already become final) and the district court clearly erred in its assessment of the evidence (the *uncontroverted* evidence introduced by Curry at the remand hearing refuted any factual basis for the imposition of sanctions against him).

The Court of Appeal accordingly did not identify specific actions by Curry which justified the imposition of

sanctions under the court's inherent power. *No court has articulated any factual support for the statements asserted by the trial court in 1989 and "reinstated" on remand.*[24]

It is the essence of a fair hearing that evidence be considered. It is the essence of due process that there be an opportunity for an effective review, particularly when the trial court's hearing or conclusions are defective. Neither occurred here.

CONCLUSION

The adversary system rests upon the assumption that, through ardent advocacy of opposing views of the facts and the law, the truth will emerge from the trial's

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[24] The only evidence of allegedly sanctionable activity to which the court of Appeal even makes reference upon its review of the record is Curry's "support" for a writ of mandamus – filed only in the Court of Appeals – which urged recusal of the district judge. 894 F2d at 699. (App. A-69) That filing was not, in fact, even submitted in the district court. That "support" consisted – *in its entirety* – of the following two sentence statement:

> "Mabel Baker supports and joins in petitioner's request to disqualify Judge Scott. However, Mabel Baker offers no argument concerning that request, being of the opinion that that issue has been fully briefed by petitions."

Curry never field a motion to recuse the trial judge, either before the trial court or in the Court of Appeal; the only mention of recusal was the quoted statement in a brief in the Court of Appeal. The brief was submitted primarily to address other issues in response to the appellate court's call for briefing on various pending issues. Curry's testimony at the remand hearing affirms that the statement was made in good faith in representing the interest of his client. The "recusal statement" surely cannot be seriously considered a justification for the imposition of sanctions against Curry; and even if it is, it is a pleading "violation" well within the scope of Rule 11.

crucible. The judicial system should and does draw the line at advocacy that is in bad faith or that flaunts the authority of the court. The judicial system, however, should not chill the rights of defendants to oppose multi-million dollar claims that are dropped only on the eve of trial.

The judicial system should not allow sanctions to be imposed under inherent power when the conduct complained of only involves pleadings, an area expressly covered by Rule 11's precise rules and procedures. The judicial system should require that respondents in inherent power actions be given specific notice of precisely what conduct may lead to sanctions prior to a hearing, and the hearing should be one in which uncontroverted evidence is given due weight.

These issues affect every lawyer who practices in any federal court throughout the land; in light of this Court's *NASCO* opinion recognition of the broad scope of inherent power, it is appropriate that the Court grant this petition to resolve these issues.

All of the above and foregoing is thus respectfully submitted.

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NASCO, INC.

v.

CALCASIEU TELEVISION AND RADIO, INC., et al.

Civ. A. No. 83-2564.

United States District Court,
W.D. Louisiana,
Lake Charles Division.

Jan. 23, 1989.

Neal & Harwell, Aubrey B. Harwell, Jr. and Jon D. Ross, Nashville, Tenn., Scofield, Bergstedt, Gerard, Mount & Veron, and David L. Hoskins, John B. Scofield, Lake Charles, La., for plaintiffs.

Rubin, Curry, Colvin & Joseph, Michael H. Rubin and Richard A. Curry, Baton Rouge, La., for Mabel Christine Baker.

Camp, Carmouche, Barsh, Hunter, Gray, Hoffman & Gill, Gary L. Boland, Baton Rouge, La., Russell T. Tritico, Lake Charles, La., for Calcasieu Television and Radio, Inc. and G. Russell Chambers.

Onebane, Donohoe, Bernaed, Torian, Diaz, McNamara & Abell, John G. Torian, John Keller, P.O. Drawer 3507, Lafayette, La., for A.J. Gray.

Nick Canaday, Baton Rouge, La., Adams & Reese, Michael G. Crow, New Orleans, La., for Edwin A. McCabe.

OPINION

NAUMAN S. SCOTT, District Judge.

This matter is before us on a Motion to Fix Compensatory Damages Pursuant to Contempt Judgment, To Fix Appellate Sanctions, and To Impose Sanctions.[1] The mover is NASCO, Inc. (NASCO). The respondents include G. Russell Chambers (Chambers), A.J. Gray, III (Gray), Edwin A. McCabe (McCabe), Mabel Christine Baker (Baker), and Richard A. Curry (Curry).

Nasco filed this action in diversity on October 17, 1983 for the specific enforcement of an August 9, 1983 Purchase Agreement providing for the sale of television station KPLC-TV in Lake Charles, Louisiana to NASCO and for injunctive relief to prohibit the transfer of the properties to any third party in violation of the Purchase Agreement. Due notice of NASCO's application for injunctive relief was given to the attorneys for sellers prior to Sunday, October 16, 1983, and sellers on that day created a trust and transferred properties to the trust in violation of the Purchase Agreement and for the admitted purpose of placing these properties beyond the jurisdiction of this Court. The defendants in the underlying

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[1] By order dated February 1, 1988, we fixed the contempt damages previously awarded to NASCO in the amount of $6,233.27, together with legal interest thereon at the rate of 7.14% per annum from February 1, 1988, until paid. (The $6,233.27 amount includes $4,754.00 in attorney's fees and expenses and $1,479.27 in out-of-pocket expenses incurred by NASCO's director James Smith in testifying at the contempt hearing). That issue is therefore not addressed herein.

action are Calcasieu Television and Radio, Inc. (CTR),[2] the owner and defaulting seller; Chambers, the sole shareholder and sole Director of CTR, who signed the Purchase Agreement on behalf of CTR and in his individual capacity, and who caused the corporation to breach the Agreement; and Baker, Chambers' sister and the Trustee of the Facility Trust, an entity created by Chambers on the eve of this litigation to receive simulated ownership of certain station properties in order to prevent judicial enforcement of the sale.

The litigation was tried to the Court without a jury on April 17, 1985. NASCO prevailed.[3] This Court's refusal to stay execution of the judgment pending appeal was sustained by the Appellate Court.

On August 6, 1986, the United States Court of Appeals for the Fifth Circuit, at the close of oral argument, ruled from the bench, *per curiam*, affirming this Court's judgment on the merits, declaring the defendants' appeals to be frivolous, imposing appellate sanctions against Chambers and Baker pursuant to Fed.R.App.P. 38 in the form of attorney's fees and double costs, and remanding the case with instructions to fix the amount of the appellate sanctions and to determine whether further

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[2] Calcasieu Television and Radio, Inc. (CTR), an original defendant in the underlying litigation, was liquidated following the sale of KPLC-TV to NASCO. It is thus not a respondent in the instant matter.

[3] This Court issued its Opinion on the merits on November 8, 1985, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 623 F.Supp. 1372 (W.D.La. 1985), and Judgment was signed on November 27, 1985.

sanctions should be imposed against the defendants and/or their counsel for the manner in which the litigation was conducted in the district court.[4]

Continued resistance by Chambers, his employees and agents, including McCabe after our November 27, 1985 judgment on the merits, delayed completion of the sale until August 27, 1986. Thereafter NASCO's claims for damages under La.C.C.Art.1986 (specific performance) as a result of Chambers' breach of the agreement were disposed of before NASCO could prepare and file, on December 29, 1987, the motion now before us, first, to fix the amount of the appellate sanctions imposed against Chambers and Baker by the Fifth Circuit, and, second, to impose appropriate sanctions against the respondents, including Chambers, Gray, McCabe, Baker, and Curry, for the manner in which the defense of this action was conducted in the trial court. NASCO seeks *appropriate* sanctions – including all attorney's fees, costs, and expenses it incurred during the course of the entire proceedings. These sanctions are sought under the aegis of the Court's inherent equitable powers, and the provisions of 28 U.S.C. § 1927 and Fed.R.Civ.P. 11.

An evidentiary hearing was held on April 11, 1988. Suggested findings and conclusions as well as authorities (including additional authorities requested by us on

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[4] *See NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 797 F.2d 975 (5th Cir.1986) (*per curiam*) (unpublished order); *Id.* (5th Cir. Aug. 11, 1986) (*per curiam*) (unpublished order amending Order of Aug. 6, 1986); *Id.* (5th Cir. August 27, 1986) (*per curiam*) (unpublished opinion affirming judgment on the merits).

December 12, 1988) have been submitted by all parties and are now before us.

ISSUES

The issues before the Court are as follows:

A. Fixing the amount of attorney's fees and of double court costs on appeal decreed as sanctions by the Court of Appeals.

B. Determining whether sanctions are appropriate for the manner in which this proceeding was conducted in the district court from October 14, 1983, the time that plaintiff gave notice of its intention to file suit to this date and, if sanctions are appropriate, to determine what party or parties should be sanctioned and the character of sanctions to be assessed.

FINDINGS OF FACT

A. *Preliminary History:*

1. On August 9, 1983, NASCO, as buyer, and CTR and Chambers, as sellers, entered into an Agreement to convey the television facilities and the broadcast license of KPLC-TV in Lake Charles, Louisiana for the purchase price of $18 million dollars. The Agreement has never been recorded in Calcasieu and Jefferson Davis Parishes where the properties are located.

2. The Agreement provided that time is of the essence in the performance of the Agreement, Paragraph 31, and provided specifically that consummation of the

Agreement is subject to the approval of the Federal Communications Commission; that the parties shall proceed as expeditiously as possible to file all requisite applications and other necessary instruments, to process said applications with all reasonable diligence and to cooperate and use their best efforts to obtain the requisite consent and approval of the Commission and to carry out the provisions of the Agreement. In no event was the joint application to the Commission to be filed later than forty-five days from the date of the Agreement, namely September 23, 1983.

Chambers, the sole stockholder and sole member of the Board of CTR, and his attorney, Jonathan Golden, who was also assistant secretary of CTR, negotiated and consummated the Agreement on behalf of CTR. In fact, they were the only CTR employees or representatives having knowledge of the existence of the Agreement until Chambers' meeting with NASCO representatives in Lake Charles, Louisiana on August 22, 1983.

3. On that date, Brian Byrnes and Jim Smith, who signed the Agreement on behalf of NASCO, visited KPLC-TV at the invitation of Chambers for the purpose of drafting an appropriate public announcement of the Agreement. Until he left the meeting, Chambers had been most cooperative in carrying out the Agreement.

Rita Guillory,[5] President of CTR, had no part in the negotiations and was not consulted regarding the Agreement. At this meeting she learned for the first time that

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[5] Rita Guillory became Rita Chambers after her marriage to G. Russell Chambers on or about November 1983.

KPLC-TV was to be sold and that she would lose her job as President. CTR's cooperation ceased the minute that Chambers left the meeting. Byrnes and Smith left and no representatives of NASCO would be present at the station again until sometime after September 23, 1983.

4. Chambers called Bill Cook, chairman of NASCO, on August 29, 1983 and tried to talk him out of going through with the Agreement, offered to reimburse all of NASCO's expenses and pay some additional money. Cook declined.

5. On September 2, 1983, NASCO informed CTR and Chambers that NASCO's portion of the Assignment Application was ready and in suitable form for filing with the FCC.

6. On or about September 7, 1983, Chambers had a telephone conversation with Brian Byrnes in which he asked "What would you say if I didn't file?" Byrnes replied that NASCO had been ready to file its portion of the FCC application since September 1 or 2, and that he would be very disappointed.

7. Byrnes and Chambers spoke again on Monday, September 12, 1983. When Chambers asked what Byrnes thought of Chambers' remark on September 7th, Byrnes replied that, based on his brief contacts with Chambers, he thought that Chambers would do what the Agreement provided. Chambers answered that he recognized that he (CTR) had a contractual obligation to file CTR's portion of the FCC application.

8. In a letter (Ex. P2) dated September 16, 1983, NASCO (Brian Byrnes) referred to the content of the

conversations (paragraphs 5-7 supra) in detail, and again notified CTR and Chambers that the assignee's part of the application had been ready and in suitable form for filing since September 2nd and requested that CTR "immediately prepare, have executed and forwarded the assignor's portion of the assignment application prior to September 23, 1983."

Chambers replied on September 21, 1983 (Ex. P3) that the Agreement speaks for itself and that he understood that his "attorney has contacted your attorney." He did not deny any of the content of the September 16, 1983 letter (Ex. P2).

9. On September 23, 1983, NASCO's FCC counsel, John Steward, was informed by Chambers' (CTR) FCC counsel, Roy Russo, that the assignor's portion of the Application would not be filed on that date. On that same date Steward caused a letter to be hand delivered to Russo, stating again that NASCO was ready and willing to file the assignee's portion of the Application and that Russo should notify him if and when the assignor's portion was received.

10. From August 9, 1983, the date that the Agreement was executed by the parties, until September 23, 1983, the date by which CTR was to submit its portion of the FCC application, there was no default or violation of the Agreement on the part of NASCO. In fact, all parties including Chambers, were performing and ready to go forward on August 22, 1983. When Chambers called Bill Cook on August 29, 1983 (see paragraph 4 supra), they talked some forty-five minutes. Chambers did not complain then or thereafter of the violation of any pre-August

9, 1983 understanding or of the Agreement or interference with station operations or harassment of personnel or any difficulty with ascertainment interviews – all of which have been alleged by defendants following the institution of this suit. He simply tried to generate with Cook some terms on which he could buy out of the Agreement. Cook was adamant.

11. In Chambers' conversations and correspondence with Byrnes after August 29, 1983, he never once alluded to any such breaches by NASCO, he talked only of an unrelated bond problem as the reason for his admitted reluctance to file CTR's portion of the FCC application. Although he admitted that he and CTR were bound by the Agreement (now a stipulated fact, see paragraph 25 infra), Chambers suggested on September 7, 1983 for the first time that he (CTR) might refuse to file timely his portion of the FCC application (paragraphs 6, 7 and 8 supra). His (CTR's) acts after August 29, 1983 finally culminated in his (CTR's) unjustified and arbitrary refusal to file CTR's portion of the FCC application by September 23, 1983. This refusal was a deliberate violation of their obligations under Paragraphs 6 and 31 of the Agreement. Their refusal or failure to file was in absolute bad faith.

12. Several weeks prior to October 17, 1983 Chambers sought the advice of Camp, Carmouche, Barsh, Hunter, Gray & Hoffman, his Lake Charles attorneys who had not represented him previously in this matter, to discover a way to defeat the August 9, 1983 Agreement and retain title and possession of the properties described therein for CTR. Upon investigation and discovery that the Agreement was not recorded, Gray, who had assumed

the duties of trial attorney, suggested that the Public Records Doctrine might be an effective solution. The plan was simple. If CTR could sell the station site and the tower site to a third party prior to the recordation of the Agreement or the issuance of an injunction, the Court would be forced to recognize that title and possession of the properties was no longer in CTR; was beyond the jurisdiction of the Court so that the Court could not enforce specific performance against CTR.

B. *The Initial Fraud:*

13. On Friday, October 14, 1983, counsel for NASCO notified Jonathan Golden, an attorney for Chambers and CTR and an officer of CTR, that it would file suit in the United States District Court for the Western District of Louisiana in Alexandria, Louisiana on Monday, October 17, 1983, seeking specific performance of the Purchase Agreement and that counsel for NASCO would appear in Alexandria at approximately noon on that date to request injunctive relief to preserve the status quo by enjoining the alienation or encumbrance of the subject properties until a judicial resolution of the dispute could be obtained. This information was transmitted to Chambers through his Lake Charles attorneys on Saturday, October 15, 1983.

This notice to the defendants Chambers, CTR and Gray, pursuant to the requirements of Fed.R.Civ.P. 65(b) and Rule 11 of the Local Rules of this Court, is designed to allow a defendant in an application for a temporary restraining order to be present at the hearing and defend his interests.

On the afternoon of Sunday, October 16, 1983, Chambers and Gray knowingly and deliberately look advantage of this notice to form and set into motion an illegal and fraudulent scheme and conspiracy which they have admitted was designed to place the operating properties of CTR beyond the reach and jurisdiction of this Court through the medium of the Louisiana Public Records Doctrine and to deprive NASCO of a judicial determination of its rights to specific performance and still maintain CTR in possession and in a position to continue its operations without interruption.[6] Their first act in furtherance of the conspiracy was the formation and execution of an act of donation in trust with a corpus of $1,000.00;[7] appointing Chambers' sister, Baker, as Trustee and naming Chambers' three adult children as beneficiaries. Chambers, Rita Guillory and Gray were fully aware on October 16, 1983 that the two tracts of land on which the TV station and the transmitters were located were to be sold to NASCO under the Agreement of August 9th. Yet, contemporaneously with the drafting of the Trust, Chambers, the sole member of the Board of Directors and the sole stockholder of CTR, by resolution directed Rita Guillory, the President of CTR, to execute duplicate warranty deeds conveying the two tracts to Baker, Trustee, for a recited consideration of $1.4 million dollars. The president of CTR complied.

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[6] *See* Transcript of April 11, 1988 hearing pp. 114-118; 152-159.

[7] There is evidence that the $1,000 corpus was never paid into the Trust. This omission may have rendered the Trust invalid. La.R.S. 9:1731. *See* Restatement 2d Trusts § 74 and Comment(b) to La.R.S. 9:1822.

14. On the evening of Sunday, October 16, 1983, Chambers telephoned his sister, Baker, in Birmingham, Alabama and informed her of the creation of the Trust and that it was his wish that she act as Trustee. He did not refer to the duplicate deeds which had been executed by Rita Guillory on behalf of CTR. After she consented to be Trustee, Chambers told Baker that he would be coming to Birmingham the next day to have her sign some documents.

15. The deeds were recorded at 8:30 a.m. on Monday, October 17, 1983; with no signature by the purchaser, Trustee Baker; with none of the consideration having been paid, and with CTR still in undisturbed possession despite the recordation of the deeds. All this was accomplished at the sole direction of Chambers and Gray.

16. Late on the morning of Monday, October 17, 1983, NASCO's counsel appeared before us in Alexandria, Louisiana and filed NASCO's complaint against CTR and Chambers seeking as part of the relief against those parties specific performance of the Agreement and a Temporary Restraining Order (TRO) to enjoin those parties from alienating or encumbering the properties covered by the Agreement. Gray had requested by a telephone call to the Clerk of Court's office that morning that he be informed when NASCO's counsel arrived. We personally called Gray, informed him that NASCO's counsel were present and that NASCO's counsel had stated to us that notice had been given to Gray of the injunctive relief sought by NASCO. Gray did not plead surprise or lack of notice. Had he done so, we, considering the substance of the relief sought, would have delayed action until he could be present. This was not

considered, however, because Gray stated that he did not intend to be present and that he was making no statements or representations on behalf of his client. However, he did participate fully in the conference. We informed him of the nature of the injunctive relief sought, read to him verbatim that section of the suggested TRO which pertained to inspection of records. Gray suggested alterations, all of which were agreed to by NASCO's counsel. They were incorporated into the TRO which was then signed by us, with Gray's consent, at 1:34 p.m. A hearing for a preliminary injunction was set for October 24, 1983. Gray participated in the TRO conference by telephone as fully as he could have done if personally present. His participation was, in effect, a waiver of notice. Although Gray, during this discussion, was then deeply involved in Chambers' scheme to place the property beyond the reach and jurisdiction of this Court, he made no mention of this to the Court.[8] Ex.P. 10.

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[8] Unbeknownst to the Court, Gray surreptitiously tape recorded these telephone conferences. Transcripts of those tape recordings were attached as exhibits to Chambers' Memorandum in Opposition to Request For Sanctions. *See* Chambers Memorandum Exhibit A. Those transcripts reveal a telling exchange during the course of Gray's discussions with the Court on the scope of the proposed injunctive strictures:

> Judge [Scott]: I have an understanding of the representation bid [sic], *you are not trying to sell to someone else.*
>
> Gray: *I have made no representation.*

Id., p. 2 (second conversation) (emphasis added).

No clearer opportunity to reveal the truth could have been offered to Gray. No clearer evidence of *deliberate* and *devious* concealment could be found.

17. At or about 4:30 on the afternoon of Monday, October 17, 1983, after the deeds had been recorded, and after the TRO had been signed in Alexandria, Chambers flew to Birmingham, Alabama and met Baker at the airport. He directed her to sign her acceptance of the office of trustee and the $1.4 million note to CTR. She did as directed. She does not recall being told about the sale or receiving a copy of it. She signed the note without knowledge of what she was signing, what it was for, or how she was going to pay it. Baker was given no explanation and she did not ask for any.

18. On Tuesday, October 18, 1983, Gray admitted by letter the recordation of the duplicate deeds at 8:30 a.m. on Monday, October 17, 1983 and that he had intentionally concealed that fact from the Court prior to, during and after the issuance of the TRO.

19. Chambers' attorneys prepared a leaseback agreement from Baker, Trustee, to CTR covering the same properties allegedly conveyed to Baker in the duplicate deeds of October 16, 1983. Rita Guillory signed this instrument on behalf of CTR on October 22, 1983 and forwarded it to Baker, directing her to sign and return it. Baker had no notice or other reason to expect the receipt of this lease. Baker knew nothing of its terms or contents and she had no part in any negotiations. No explanation accompanied the lease; Baker had no conversation with or advice from Rita Guillory, Chambers or anyone else. She simply signed and returned the lease on October 25, 1983. It is not shown in the record, even at this late date, that Baker was aware of the October 16, 1983 "sale" from CTR or the identity of the property covered by that "sale."

20. On Monday, October 24, 1983, we granted a preliminary injunction against CTR and Chambers, and entered a second temporary restraining order directed against Baker to prevent her from selling, transferring, or in anyway encumbering the CTR properties. Mr. Gray appeared as counsel for CTR and Chambers but denied representation of Baker. NASCO's counsel, having assumed Gray would represent her, then made attempts to contact Baker prior to the Court's issuance of the order. Failing such notice, the Court, in the interest of Justice, granted such TRO against Baker, as Trustee of the Facility Trust at 10:37 a.m. on October 24, 1983.

21. At this same meeting, although we were not yet aware of the lease-back agreement, we, for the first time, warned Gray that the acts of Chambers and himself on October 16 and 17, including Gray's concealment of those events, were reprehensible and unethical and that no acts of that nature should be repeated in the future. We felt that Gray would abide by that warning.

C. *The Pretrial Skirmishes:*

22. Our expectations were short-lived. In November 1983 Chambers, acting on the advice of Gray, refused to allow an inspection of corporate records in direct defiance of the standing preliminary injunction. The ensuing contempt proceedings, *NASCO, Inc. v. Calcasieu Television & Radio Inc.*, 583 F.Supp. 115 (W.D.1984), vindicated NASCO's rights, but only at the price of significant expense, delay, and waste of resources. That price was made more dear by Gray's vigorous prosecution on behalf of Chambers of two separate and independent

appeals which were dismissed by the appellate court without consideration of the merits. *See NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 752 F.2d 157, 157-58 (5th Cir.1985).

23. Subsequently a series of meritless motions and pleadings and delaying actions were initiated by defendants.

a. Two motions for summary judgment filed by Gray and Boland on behalf of Chambers (CTR).

b. Motion for summary judgment filed by Curry on behalf of the Trustee followed by Motion to Strike and a supplemental motion thereto; a motion to reconsider (no new grounds).

c. Motion for protective order and clarification filed by Gray on behalf of Chambers (CTR).

d. Chambers (CTR) through Gray filed baseless charges and counterclaims against NASCO alleging fraud, harassment, interference with TV station operations, spreading of misinformation, public disapproval of the sale and of plaintiff as owner-operator of the station. Also charged were unnamed breaches of the Purchase Agreement by NASCO and NASCO's disregard for a nonexistent oral side-agreement with Chambers (CTR).

e. Chambers (CTR) through Gray injected pointless new issues: NASCO's conduct of its FCC ascertainment survey; its ability to pay the purchase price; its plans for the future management of the station; its commitment to the community interest.

f. Absolutely needless depositions of officials of the bank that was to finance the purchase price were noticed

by Gray and taken by McCabe on behalf of Chambers (CTR).

g. Depositions of the entire NASCO board of directors were noticed and five were taken.

h. Throughout the course of these proceedings prior to the trial on the merits, Chambers (CTR) and Gray sought repeatedly, sometimes successfully, continuances of trial dates, extensions of deadlines and deferments of scheduled discovery.

All of the motions mentioned above in a, b and c required research and opposition by NASCO and considerations by the Court. All were filed in absolute bad faith by attorneys who conceived "The Initial Fraud" (Gray) or had become intimately familiar with it through instruction, the record and depositions (Curry). Chambers (CTR), Baker (Trustee) and these attorneys, as a basis for these motions, brazenly and deliberately urged upon this Court as uncontroverted fact, the attempted simulated and fraudulent sale to the Trustee Baker which all of these knew was fraudulent and was attempted for the sole purpose of depriving NASCO of its right to specific performance by placing the property beyond the jurisdiction of the Court.

The charges mentioned in d above were deliberate untruths and fabrications by Chambers. They were, on their face, improbable and unrealistic. Yet these attorneys, without any investigation whatsoever, filed them. We find, under the circumstances, that these attorneys knew, at the time that they were filed, that they were false.

The acts described above in e, f, g and h were simply part of the sordid scheme of deliberate misuse of the judicial process; to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources.

24. Having held a pretrial conference and several status conferences and ruled on several motions in preparation for a trial on the merits set for February 27, 1985, we were confronted on January 28, 1985 by a motion filed on behalf of Chambers (CTR) by Gray to recuse the trial judge for bias and prejudice. An expedited evidentiary hearing was had; we considered and denied the motion. A writ of mandamus to compel disqualification was filed with the U.S. Court of Appeals for the Fifth Circuit by Gray for Chambers (CTR). Curry, on behalf of the Trustee, filed an "answer" in which he urged the granting of the writ. The writ was denied as being meritless, but trial on the merits again was delayed.

25. Finally, on the eve of trial, Chambers (CTR), Baker, and their counsel stipulated that the Purchase Agreement was valid and enforceable, and that Chambers (CTR) had breached the agreement on September 23, 1983. No clearer indication could be found that all of the previously asserted affirmative defenses, all of the previously asserted counterclaims, all of the multitudinous pleadings and motions and oppositions prosecuted so fervently by the defendants, were untruths and distortions and were absolutely devoid of substantive merit. Defendants obtained no tactical or strategic benefit by this stipulation. They suddenly were faced with the necessity of producing evidence to sustain the charges and the fact that Chambers' testimony in support of those

allegations would be perjury. Of the 100 witnesses listed by Chambers prior to trial, only two appeared to testify. Of all the multitude of allegations and counterclaims asserted by Chambers and filed by Gray and Curry prior to trial, only one defense was actually presented: the Public Records Doctrine defense manufactured as part of "The Initial Fraud".

D. *The Posttrial Skirmishes:*

26. After the April 1985 trial on the merits and during the delay for submission of authorities, suggested findings and conclusions and our consideration of the merits, Chambers (CTR) and his attorneys continued to use every means, every subterfuge, every ruse possible to avoid performance of the Purchase Agreement.

a. Chambers, without notice to NASCO, petitioned the FCC for permission to construct a new transmission tower for the station, and to relocate the station's transmission facilities to that site. This would have been a material alteration of the *status quo*. The tower sites would be covered no longer by the Purchase Agreement. Only the informal intervention of this Court, and NASCO's threat of further contempt sanctions, persuaded Chambers to withdraw the application.

b. Following the rendition of Judgment on November 27, 1985, Chambers and Baker, acting through Gray and Curry, moved this Court to stay its judgment pending their contemplated appeals. Extensive memoranda, and no less than three status conferences, ensued. All parties having admitted that the Purchase Agreement

was legal, valid and enforceable, the Public Records Doctrine having been rejected and all other baseless defenses having been withdrawn, the plaintiff having suffered delay, harassment and enormous expense since October 17, 1983, we refused steadfastly and absolutely to grant a stay. Curry, on behalf of the Trust, filed a petition for a writ of mandamus to the Fifth Circuit in an attempt to *force* this Court to grant the stay. Chambers petitioned the Fifth Circuit directly. Both were denied. Chambers then petitioned (via his Washington lawyers) the Honorable Byron R. White, Associated Justice of the United States Supreme Court, to stay our merits judgment. That petition, too, was denied.

c. During the pendency of the defendants' appeals, Chambers (CTR) renewed his efforts to circumvent the merits judgment by fomenting opposition to the pending application for FCC approval of the transfer of the station license. Specifically, formal oppositions were lodged with the FCC, and were subsequently prosecuted, by two corporate officers of CTR – in direct violation of both the injunctive orders and the merits judgment. NASCO was thus compelled to seek contempt sanctions for a third time. Again by informal intervention by us, the oppositions were withdrawn.

d. Gray resigned as counsel for Chambers and CTR on April 2, 1986. Thereafter Chambers (CTR) continued his refusal to begin preparation to close the sale. NASCO, on July 1, 1986, again was forced to seek judicial assistance and hearing was fixed for July 16, 1986. Thereupon Chambers called upon his Boston, Massachusetts attorney, Edwin McCabe, to command his campaign of defiance delay, harassment and expense. McCabe had

represented Chambers (CTR) previously in the pointless depositions of bankers who had done business with NASCO. McCabe proved to possess unethical abilities equal to the job.

e. On July 21, 1986, we sustained NASCO's motion to quash the subpoena duces tecum filed on behalf of Chambers and CTR directing NASCO to produce confidential financial information pertaining to discussions between plaintiff and financing institutions with whom plaintiff had conferred concerning the financing of the purchase price for television station KPLC-TV.

f. At the commencement of the July 16, 1986 hearing we informed McCabe that we had encountered much sanctionable conduct in the trial of this case and we would not tolerate or countenance any additional conduct of that nature, and that the hearing would be limited to the trial of Chambers' (CTR) contention that certain operating equipment, which had replaced equipment listed in Exhibit B on August 9, 1983, should not be included in the sale. McCabe had already filed an opposition and prehearing memorandum, raising a multitude of irrelevant arguments; a request for a trial by jury on the pending motions, and a motion *in limine* to exclude any evidence pertaining to station assets not listed in Exhibit B to the Purchase Agreement. We denied all of these prehearing motions.

g. The July 16, 1986 hearing went into recess for several days and during that recess the defendants unilaterally, and without notice to the Court, or opposing counsel, removed from service *all* of the equipment at issue in the hearing. That action was undertaken at

McCabe's direction and was an attempt by Chambers (CTR) and McCabe to resolve extrajudicially and through self-help the very issues then before the Court. On July 22, 1986, we ordered that the equipment previously removed be returned to service, and to remain so during the remaining pendency of the litigation. The July 16, 1986 hearing was itself a case study in deception. CTR's accountant, and two of its corporate officers (Rita Guillory Chambers, Chambers' wife, and his longtime employee, Albert Smith) gave false and perjured testimony concerning the ownership and use of the disputed assets. Seventeen fraudulent equipment leases were introduced by McCabe to prove that the disputed equipment did not belong to CTR but to another Chambers corporation and was merely leased to CTR. Ultimately these leases were found by us to be "nothing more than instruments of deception."

h. On July 28, 1986 – despite the pendency of NASCO's motion for judicial assistance, despite our clear and repeated orders that the *status quo* would be preserved, and despite the fact that we had taken NASCO's motion under advisement for the rendition of judgment – McCabe caused a letter to be sent to NASCO's counsel stating Chambers' unilateral intention to close the sale of KPLC-TV on August 4, 1986, and to convey only those assets listed on Agreement Exhibit B – expressly excluding the disputed equipment that was the subject of the pending motion for judicial assistance. That letter was nothing more and nothing less than an attempt to maneuver NASCO into position for the termination of the sale by Chambers under Paragraph 16, of the Purchase Agreement. On July 31, 1986 we granted NASCO's pending

motion seeking relief from the timing and termination provisions of Paragraph 16 of the Agreement.

i. On August 5, 1986, McCabe caused to be filed (1) an appeal from our order of July 31 (granting relief from the timing and termination provisions of Paragraph 16); (2) a separate appeal from our order of July 24, 1986 (ordering Chambers to restore the disputed equipment to service); and (3) a motion to vacate our merits judgment of November 27, 1985 for the specific performance. On the same date, Chambers' New Orleans counsel moved the Court of Appeals for the Fifth Circuit to upset and continue the oral argument on the pending appeals, then scheduled for August 6, 1986. That motion was summarily denied by the appellate court.

The basis for McCabe's motion to vacate the merits judgment was the termination provisions of the Purchase Agreement; in essence, an argument that NASCO had breached the Purchase Agreement by declining to close the sale on August 4, 1986 in submission to Chambers' unilateral demand, and that, because Chambers had managed to delay both FCC approval of the license transfer and the closing, Chambers was entitled to terminate the contract.

27. This Court throughout this proceeding has attempted to restrain the fraudulent and unethical conduct of the defendants and their attorneys.

a. As previously stated, paragraph 21 supra, we warned Gray of his unethical actions (The Initial Fraud) on October 24, 1983.

b. The judgment of this Court after the contempt hearing a month and a half later was, by its inherent nature, a warning against any similar conduct in the future.

c. Some months after that we called, on our own initiative, a status conference to determine why depositions of a number of bankers had been noticed and whether these were actually necessary. When we were informed by defendants' counsel that the purpose was to test NASCO's ability to meet the $18 million dollar purchase price mentioned in the Purchase Agreement, we informed them that that was not a relevant issue and that a more positive and less expensive way to determine that issue was an offer by defendants to perform the Purchase Agreement. We cancelled the uncompleted depositions consistent with our powers under Fed.R.Civ.P. 26(g). This was another warning.

d. On January 18, 1985, about a month prior to the then current trial date of February 27, 1985, Chambers and Gray filed a motion to disqualify the trial judge. Although the motion was dismissed by us because the supporting affidavit by defendant Chambers was legally insufficient, we felt that the motion actually was frivolous and had been filed for tactical purposes. We also felt that, because of the nature of the proceeding, a renewal of the warning was inappropriate.

e. We called a status conference on April 8, 1985, nine days prior to the final trial date of April 17, 1985. At this conference we again gave warning and distributed to

the attorneys copies of Judge Schwartzer's article, "Sanctions Under the New Federal Rule 11 – A Closer Look", 104 F.R.D. 181 (1985).

f. At the commencement of the hearing held July 16, 1986, we again repeated our warning, this time specifically to McCabe. McCabe's reaction is described above, paragraph 26f-i.

28. Little more need be said about the role of Chambers and Gray in this sordid, dishonest and deliberately unethical chain of events called a lawsuit. In the memoranda of authorities submitted by them on the sanction phase of this suit, each vigorously assails the character and credibility of the other as if this automatically places his own character and credibility beyond reproach. But the record itself establishes that both are capable of any fraud that is necessary for a given purpose, and that neither is worthy of belief.

On Sunday, October 16, 1983, one day after they had received notice that NASCO was applying for injunctive relief against CTR and Chambers, Chambers and Gray formed a conspiracy for the sole and dishonest purpose of defeating the Purchase Agreement which both of them knew at the time to be absolutely legal and enforceable. Both of them were admirably equipped to carry out the purposes of the conspiracy since neither of them was restrained by any sense of honesty, integrity or ethics. The very first act of the conspiracy, the so-called Public Records Doctrine defense, set the ethical tone of all of its acts which followed. It was a web of deliberate fabrications, misrepresentations and fraud, some of which were intended to mislead the public in general while others

were aimed only at the Court and opposing counsel. One of the original representations to the Court and opposing counsel was that the Trust had been contemplated for years and that its confection on October 16, 1983 was simply coincidental. Though not actually a Cash Sale, the form of the sale was drafted and created to have the appearance of a Cash Sale so that it could be recorded without the signature of the vendee on Monday morning, October 17, 1983, before the TRO, prohibiting such transfer, could be granted by the Court. It was absolutely null and void because the recited purchase price had not been paid and the vendor had not delivered possession of the property. In his conversations with the Court, Gray did not disclose the existence of the Trust or the existence of the sale from CTR to the Trustee. Without the knowledge or permission of the Court, he recorded that conversation with the Court. Although he knew that the TRO had issued at 1:39 p.m. on Monday, and that Chambers was making a trip to Birmingham, Alabama to secure the Trustee's signature on an acceptance of the Trust and on the worthless $1.4 million dollar note, he made no effort to warn Chambers that these acts in completion of the sale had been restrained by the issuance of the TRO. The leaseback agreement executed some days later, in absolute contempt of the TRO and the injunction, sought to complete the sale by delivering constructive possession of the properties to the Trustee and to give the Trustee money to pay for the property which CTR itself had sold to the Trustee. All of the activities to be performed thereafter by conspirators and those who joined them later, namely, McCabe, Baker and Curry, in connection with the trial of this lawsuit were performed in connection with

and in the furtherance of the conspiracy. Chambers continued his activities through August of 1986. In absolute violation of the injunction and of our Judgment of November 27, 1985, two of the officers of CTR filed oppositions to the joint applications for transfer which had been filed with the FCC by the Order of this Court. Little over a month before the appellate court issued its decree in favor of NASCO and finding sanctions, Chambers hired McCabe who immediately rekindled the flames of harassment, delay and expense and McCabe, on behalf of Chambers, engineered the removal of equipment at the July 16, 1986 hearing and induced Chambers' wife, Rita Guillory Chambers, still president of CTR, another officer of CTR and CTR's CPA to perjure themselves as has previously been set forth. *See* Opinion dated August 7, 1986, Rec. 306.

Chambers has repeated ad nauseum that he knows nothing of courts or the law, that if he is guilty of any improper act, it is only because he has been led astray by the improper advice of his counsel. His own statement absolutely refutes that contention, Record Pleading 139. Mr. Chambers has been involved frequently in the preparation of defenses in many lawsuits, he testifies and often is the principal witness. He is completely at home in court. In fact, in January and the first part of February, 1985, alone he was involved in preparation of defenses and was scheduled to testify in the following cases:

1. *Powers Medical Systems, Inc. v. Intermedics, Inc.*, Civ. No. 82-623, U.S. District Court for the District of Oregon. Docketed for trial beginning on January 8, 1985. Mr. Chambers is a major witness.

2. *American Pacemaker Corporation v. Fairchild Camera and Instrument Corporation et al,* Civ. No. 448521, Superior Court of California, Santa Clara County; and *Fairchild Camera and Instrument Corporation v. American Pacemaker Corporation et al,* Civ. No. 526893, Superior Court of California, Santa Clara County. Trial in enforcement suit set to begin January 15, 1985. Mr. Chambers is a witness.

3. *Phillip R. Beutel v. Intermedics, Inc., et al,* Civ. No. 79C3022, 23rd Judicial District Court of Brazoria County, Texas. Trial scheduled to begin on January 28, 1985. Mr. Chambers is a principal witness.

4. *Intermedics, Inc. v. Cara E. Barer, Independent Executrix of the Estate of Albert P. Beutel, II,* Civ. No. 83-F-1153, 149th Judicial District Court of Brazoria County, Texas. Trial to begin before February 1985. Mr. Chambers is a witness.

5. *Charles Moore, M.D. v. Intermedics, Inc. and Intermedics Intraocular, Inc.,* Civ. No. 80-F-1320, 149th Judicial District Court in Brazoria County, Texas. Trial set to begin on February 18, 1985. Mr. Chambers is a principal witness.

He deliberately allowed his wife and three other employees to perjure themselves at the hearing of July 16, 1986. He has been very deeply involved in the defense of this case. He was the strategist. Gray was the tactician.

Gray was the second most important schemer and conspirator. As the conspiracy's tactician, he was perfectly willing to and did employ tactics involving abuse of the judicial machinery and process, fraud and untruths to the Court and unethical methods to achieve the purposes of the conspiracy as has been outlined above.

McCabe was the third schemer and conspirator. Although he had taken part earlier in the suit, his principal involvement occurred in July and August of 1986 at a time when the Court was using every means at its disposal to enforce it judgment of November 27, 1985 and complete the sale to NASCO. During his brief term as Chambers' attorney he displayed talents very similar to those of Gray. His unsavory actions, see paragraph f-i supra, convinced this Court that it could expect another prolonged campaign of harassment, delay and expense. Plaintiff and this Court can be very thankful that the Appellate Court's decree of August 6, 1985 had the effect of cutting the duration of his term of office to a period of little over a month.

Baker was certainly a conspirator. Although she did not have full knowledge of the conspiracy and did not independently and aggressively pursue the goals of the conspiracy, she was, as Trustee-Owner of the res involved in the initial fraud, indispensable to the success of the conspiracy and the Public Records Doctrine defense in particular. She was the unfailing tool of her brother, the chief conspirator, and performed his every request without inquiry or question.

Curry also was a schemer and conspirator. Throughout this proceeding he has posed as the attorney for Baker, the individual, as if the limits of her overall knowledge and contact with the origin, purposes and progress of the conspiracy and litigation was in some manner reflected on him. Nothing can be further from the truth. Curry represented the Trust before he ever heard from Baker. He was contacted/hired directly by Gray to assist

and defend the Public Records Doctrine defense contrived by Gray in which Chambers (settlor) established a Trust so that Chambers (sole stockholder and director of CTR) could authorize Chambers (CTR) to sell CTR's operating properties to Chambers (Trustee). Gray himself already represented all of the Chambers' identities except the Trust, but even with the separate representation of the Trust by Curry, it was painfully transparent that the sale and lease involving the Trust were a mere sham. Curry knowingly and enthusiastically followed each tactic by Gray with a similar "me too" tactic on behalf of the Trust. His support was vital to the fraudulent Public Records Doctrine defense and valuable to the harassment tactics of Gray and Chambers, but he introduced no new or additional tactics to the defense. His role was one of passive but enthusiastic support.

The record is bare of one instance in which he truly advised his client. She knew no more about her responsibilities as trustee or about the details of this law suit on November 8, 1985, than she did at its inception. Curry's sole responsibility was to assure that she remained the unfailing tool of her brother. In this endeavor he was an admirable success.

29. As a direct result of the initial fraud upon the trial court, and the subsequent bad faith, dilatory defense tactics in the trial court, NASCO has incurred legal fees, costs, and expenses totalling $996,644.65:

Law Firm: Scofield, Bergstedt, Gerard, Mount & Veron

Total Fees*	486,901.25
Total Expenses*	52,508.55
Minus Fees and Expenses Awarded as Contempt Damages	–4,454.00
Minus Fees and Expenses Awarded as Appellate Sanctions	–48,633.57
NET TOTAL	486,322.23

Law Firm: Neal & Harwell

Total Fees †	424,795.00
Total Expenses †	55,262.57
Minus Fees and Expenses Awarded as Contempt Damages	–300.00
Minus Fees and Expenses Awarded as Appellate Sanctions	–17,589.45
NET TOTAL	462,168.12

Law Firm: Crowell & Moring

Total Fees	44,563.00
Total Expenses	3,591.30
NET TOTAL	48,154.30
TOTAL FEES AND EXPENSES	996,644.65

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* Includes fees and expenses of $18,703.43 for the instant proceeding.

† Includes fees and expenses of $34,756.25 for the instant proceeding.

30. NASCO's evidentiary submissions show that the fees, expenses, and costs incurred in responding to the defendants' frivolous appeals total $66,223.02. Of that total, the sum of $63.63 is attributable to "costs," as that term is defined in Fed.R. App.P. 39 (specifically, $59.63 in printing costs for the appellee's brief, and $4.00 in costs paid to the Clerk of the Fifth Circuit). The remainder, $66,159.39, is attributable to attorney's fees and expenses.

(1) Double costs	$ 127.26
(2) Attorney's fees and expenses	$66,159.39
TOTAL	$66,286.65

E. *Summary Comment:*

31.a. First Phase – This suit, as filed on October 17, 1983, was very simple and straightforward. NASCO alleged that Chambers and CTR had breached the Agreement by their failure to join with NASCO, on or before September 23, 1983, in an application to the FCC for the transfer of the KPLC-TV license as provided in the Agreement and demanded as follows:

A. Specific performance of the Purchase Agreement along with damages against defendants for their failure to perform the Agreement.

B. An expedited discovery schedule and expedited hearing.

C. Injunctive relief to preserve the *status quo* and NASCO's access to the records of CTR.

D. Alternatively, and should the Court find that specific performance was not an appropriate remedy, damages for defendants' refusal to perform.

Although many preliminary matters were presented and were considered, tried and decided by us (see Third Phase infra), the incredible fact is that *the First Phase, the merits of this suit, was never tried.*

b. Second Phase – After our conversation with Gray and the issuance of the TRO on October 17, 1983, the case still looked simple and we were prepared to expedite the trial of the case as requested as soon as defendants' answer was filed. We soon discovered, however, that we no longer had the simple suit which we expected.

NASCO's notice to attorney Golden on Friday, October 14, 1983 was transmitted to Chambers, CTR and Gray on Saturday, October 15, 1983, and provoked a meeting in Gray's office on the afternoon of Sunday, October 16, 1983 at which Chambers and Gray, along with other members and employees of Gray's firm, conspired to give birth and did give birth to the despicable and unethical chain of events which we have identified as "The Initial Fraud". These acts, along with the lies and misrepresentations to the Court which accompanied them, made the suit more complicated and more difficult. By October 24, 1983, the date of the preliminary injunction conference, it was clear that NASCO had to make Baker a party defendant and it was most important to include her on an emergency basis in the injunction since the Trust was now the apparent record-owner of CTR's operating properties. Although NASCO's cause of action remained specific performance, that issue could not be addressed by us until we resolved the question of whether this Court has the power to restore the *status quo* existing at the time that NASCO delivered its notice to Golden, that is, the power to rescind the sale to the Trust so that title reverted to the

defendant CTR. This Second Phase, whether the fraudulent sale from CTR to the trust had deprived this Court of jurisdiction, was the only issue before the court in the trial on the merits of April 17, 1985.

c. Third Phase – This phase is the informal and potentially effective defense of delay, harassment and the generation of mountainous expense so as to reduce the plaintiff to exhausted compliance. Chambers, Gray, Curry and McCabe initiated, provoked, pursued and tried any and every collateral side issue that human ingenuity could contrive. Although there was some legal basis for some of these defenses, when we view them in context with the entire record, it is quite obvious that defendants' true purpose was delay, harassment and killing expense. To borrow a phrase from the appellate court's unpublished opinion of August 27, 1986, "As judges, we cannot check our common sense in the robing room and allow disingenuous arguments to characterize as serious an appeal as manipulative as is this one before us."

Because of the admonition and warning which we voiced to Gray on October 24, 1983, and his apparent acceptance of that warning, we were confident that no additional untoward incidents would occur. We were confident that the expeditious resolution of this suit, as contemplated originally, could be accomplished.

We were dismayed and disappointed when NASCO on December 15, 1983 filed a Petition to Show Cause why defendants CTR and Chambers should not be held in contempt for their refusal to allow NASCO to examine certain records of CTR. This refusal was based on the advice of Gray on grounds that there was an ambiguity in

Paragraph 19 of the Agreement and in the injunction and that the specific examination sought by NASCO was not authorized by the language of those instruments.[9] We ruled in favor of NASCO on the grounds that if there was an ambiguity it should be clarified by application to the Court and not by the unilateral action of defendants. The interlocutory appeal was denied by the Appellate Court on June 8, 1984.

Thereafter, Gray, on behalf of Chambers and CTR, and Curry, on behalf of the Trustee, filed a number of meritless and pointless motions, including a summary judgment motion filed by Gray on June 15, 1984, followed on July 6, 1984 by a similar motion by Curry demanding dismissal of the suit on grounds that the joinder of an alleged indispensable Louisiana defendant would destroy diversity. They filed baseless, affirmative defenses and counterclaims (later destroyed by their own stipulations), pointless new issues, irrelevant or unnecessary depositions, all as is described in more detail in paragraphs 23-27 supra. Untruths and misrepresentations were asserted mainly as affirmative defenses and counterclaims. At the time they were filed, the record was bare of any evidence that they were baseless. This was not known to the Court until the filing of stipulations immediately prior to trial. Not all of these demanded a great

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[9] This, incidentally, was the specific language incorporating Gray's comments and read verbatim to him and approved by him prior to our signing the TRO on October 17, 1983. The same language appears in the injunction issued by us by consent of the parties on October 24, 1983.

deal of court time but they were costly to NASCO in terms of harassment, time, preparation and expense.

As related in paragraph 24 supra, on January 28, 1985, approximately one month prior to the then current trial date of February 27, 1985, Chambers and CTR filed a motion to disqualify the trial judge. Although the mover was well prepared, NASCO, because of the expedited procedure adopted by the Court to avoid delay, had to utilize extraordinary efforts by its attorneys to provide an opposition to the motion. The matter was heard and the motion denied for reasons recited in open court. A Writ of Mandamus to compel disqualification was filed with the U.S. Court of Appeals for the Fifth Circuit, supported by an Answer filed by Curry on behalf of the Trustee. Although writs were denied, the desired effect was attained. The trial was continued and did not begin until April 17, 1985.

All briefs and authorities had been submitted by the middle of June. Because of a personal difficulty we were absent from our office for a period of over three months and could not begin consideration of these authorities until the end of September when we were involved also in our trial calendar. Our Opinion issued November 8, 1985 and Judgment on the Merits was signed November 27, 1985. We retained jurisdiction and refused to stay proceedings so as to implement the completion of the sale at the earliest possible date. Petition for Writ of Mandamus or Prohibition were denied on appeal.

Throughout the period of trial we adhered and maintained our objective to try the specific performance case as expeditiously as possible. Suit was filed on October 17,

1983 and our final opinion on the merits was rendered November 8, 1985, a period of slightly over two years, including the period of the Court's absence in the summer of 1985. We hold that the extraordinary amount of costs and expenses expended in this proceeding were caused not by lack of diligence or any delays in the trial of this matter by NASCO, NASCO's counsel or the Court, but solely by the relentless, repeated fraudulent and brazenly unethical efforts of Chambers, Gray and their co-conspirators acting with them, namely, McCabe, Baker and Curry, in their efforts, first, to deprive this Court of jurisdiction and, second, to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance.

Although our Opinion of November 8, 1985 and our Judgment of November 27, 1985 should have terminated all further resistance to the specific performance of the Purchase Agreement (after all, the validity of the Agreement and its breach by Chambers (CTR) had been stipulated and the fraudulent Public Records defense had not deprived the Court of jurisdiction), this did not occur. Although Gray retired from his representation of Chambers (CTR) on April 2, 1986, Chambers continued with renewed vigor and vengeance his campaign of oppression, delay, harassment and massive expense. Without again discussing these incidents, they include: opposition by two CTR officers to the joint application of the transfer; renewal of discovery to determine NASCO's financial condition; the attempt, without informing the Court or opposing counsel, to substitute worn-out or obsolete equipment for the operating equipment in place on July

16, 1986; the perjured testimony in open court by Chambers' wife Rita Guillory Chambers, his long-time CTR officer-employee, and his employment of McCabe to rekindle and renew the campaign of harassment, oppression, delay and massive expense.

It would be impossible within the limits of this opinion to develop an accurate picture of this massive and absolutely unnecessary lawsuit forced on NASCO by Chambers' arbitrary and arrogant refusal to honor and perform this perfectly legal and enforceable contract. The record in this Court alone consists of 23 volumes of pleadings and 14 fully-packed expansion files of evidentiary material.

Even these voluminous records do not reflect a host of informal conferences on such subjects as requests for delays and extensions, the authority of Byrnes to sign the Purchase Agreement on behalf of NASCO; the waiver of certain of plaintiff's initial demands; bifurcation; whether defendants were entitled to a jury trial; whether Tennessee law applied; defendants' allegation that this Court was invading the exclusive jurisdiction of the FCC; Chambers' application to the FCC to remove the broadcast towers to a site not covered by the Purchase Agreement; this Court's informal action to avoid contempt proceedings against two CTR officers who had filed with the FCC oppositions to the transfer of the KPLC-TV license to NASCO. These oppositions were filed in open defiance of the injunction affecting CTR and Chambers and the injunctive provisions of our judgment on the merits of November 27, 1985 in which this Court retained jurisdiction during the period of appeal for the purpose of implementing specific performance of the contract.

These are instances of Chambers' continued opposition and continued refusal to comply with the Purchase Agreement even after he had been ordered to do so in our executory and unstayed judgment on the merits of November 27, 1985. Nor do they reflect the considerable and successful efforts of NASCO, Chambers and their attorneys to settle the amount of delay damages to which NASCO was entitled under the specific performance statutes of Louisiana. Or the records of the Appellate Court in the petitions for mandate and the several appeals filed by Gray and by Curry on behalf of Chambers (CTR). Or the records of the FCC in the several forays made into that agency. All this needless delay, harassment and expense; this despicable and unethical use and misuse of the judicial machinery and process was initiated by Chambers and Gray and was voluntarily and enthusiastically adopted by their co-conspirators, Curry and McCabe.

On August 6, 1986 the United States Court of Appeals for the Fifth Circuit affirmed the trial Court's judgment on the merits, found the appeal to be frivolous and assigned sanctions, and directed the trial court to determine whether sanctions for the proceedings held before it were appropriate. This decree of the Appellate Court halted effectively all further efforts of obstruction by defendants and their attorneys, and additional appeals then pending were withdrawn. The sale, under close Court supervision, was completed on August 27, 1986.

Even after the sale had been completed on August 27, 1986, two unresolved matters had to be concluded, namely, (a) the determination of the monetary amount of

damages which had to be paid to NASCO under Louisiana law for Chambers' delay in performance of the contract and (b) sanctions-determination of the monetary amount of the sanctions decreed by the Appellate Court and a determination of whether sanctions were appropriate against defendants and their attorneys for the manner in which the defense was conducted in the trial court and the character and amount of such sanctions if they were held to be appropriate. As stated previously, item (a), delay damages under Louisiana law has been disposed of. We now address the sole remaining issue – sanctions.[10]

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[10] We were somewhat uncertain on the methodology to be utilized by us in determining the sanction issues as they related to proceedings before the district court. We were mindful that the responsibilities of the judge in a case of this kind are quite distinct and incompatible with those of an attorney-investigator in such case. Neither research nor our discussions with the Justice Department or the Administrative Office produced a solution. We also realized that an attorney would be the necessary and proper person to defend this court's judgment in case appeal. The Third Circuit has recognized the problem in the context of Rule II appeals:

> Short of relying on or analogizing to contempt procedures and appointing counsel to defend the district court's ruling – a step we have not taken – we are left in an uncomfortable position. We must play not only our accustomed and proper role of neutral adjudicator, but also (albeit temporarily) the role of adversary to the appellant in order to test the assertions made on appeal. Our role is further complicated by the institutional association we share with the appellant's "adversary" in fact: the district judge.

(Continued on following page)

CONCLUSIONS OF LAW

32. There are three methods under which we may consider the issue of sanctions: Federal Rule of Civil Procedure II (Rule 11), 28 U.S.C. § 1927, and the inherent powers of the Court.

33. *Rule II:* Rule 11, as amended in 1983, provides in pertinent part, as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief,

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(Continued from previous page)

We are surprised that this problem has attracted no attention. We offer no solutions to it, but simply note its existence.

Snow Machines, Inc. v. Hedco, Inc., 838 F.2d 718, 726 (3d Cir.1988) (*see* footnotes 6 and 7, also at p. 726 but omitted in the above quote). We finally decided that NASCO's counsel would certainly make application for sanctions in the form of attorney's fees and expenses. The Court would rely on that application and that oppositions filed by defendants for investigation and the appropriateness of that kind of sanction. The Court would rely on its own research and any additional research that we might request of the parties regarding the imposition of other types of sanctions. On appeal, NASCO's counsel is to defend the entire judgment of this Court, including sanctions other than attorney's fees and expenses. If sanctions are found and become final, they shall include the attorney's fees and expenses of NASCO's counsel in representing NASCO and the public in the sanction phase of this suit.

> formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . .

Fed.R.Civ.P. 11.

The rule became effective August 1, 1983 and this case was filed less than two and a half months later. It is well established that Rule 11 prior to its amendment in 1983 was rarely applied. The amendment was intended to reduce the reluctance of Courts to impose sanctions by emphasizing the responsibilities of attorneys and reinforcing those obligations through the imposition of sanctions, *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866 (5th Cir.1988). Although it broadened responsibilities, it did so in a narrow area. Rule 11 appears in Section III of the Federal Rules of Civil Procedure entitled "Pleadings and Motions." The topical title of Rule 11 itself is "Signing of Pleadings, Motions, and Other Papers; Sanctions." It is concerned only with the certification implied in the initial signing of a "pleading, motion, or other paper." It tests the attorney's conduct only at the time the paper is signed. As was noted by the Second Circuit:

> While the drafters of the rule could easily have further extended its application by referring to the entire conduct of the proceedings, they

> failed to do so and instead chose to expand only the categories of papers to which the rule applies.

Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir.1986). The problems of this case have little to do with the certification involved in the signing of a "pleading, motion, or other paper." On the contrary, NASCO has alleged that the defendants have: (1) attempted to deprive this Court of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of this Court, (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance. Clearly the acts alleged under "I" above do not involve certification and cannot be considered under Rule 11. The two most important instances of charge (2) are the absolutely false assertions knowingly and deliberately made by Chambers (CTR) and his attorneys in their answers and counterclaims and in their motion to disqualify. There was no evidence in the record establishing the falsity of these allegations until the beginning of the trial of the merits. Thus sanctions under Rule 11 at the time of filing of the answers and counterclaims in November 1983 and October 1984 were impossible. Certainly the Court could not have used Rule 11 to dispose of the motion to disqualify. Nor could the charges (3), such as the applications to the FCC to remove the communication towers to another site purchased by CTR, or any other acts referred to in (3) have been reached by Rule 11. We find and agree with the parties to this sanction proceeding that Fed.R.Civ.P. 11 does not furnish a basis for the consideration of the sanctionable acts alleged by NASCO.

We find that Fed.R.Civ.P. 11 for the levying of sanctions at this time, at the time of the Appellate Court's decree on August 6, 1986, and at the time the acts themselves were committed, to be insufficient for our purposes here.

34. *28 U.S.C. § 1927:* This statute provides in pertinent part:

> Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by their court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

The sanctionable acts alleged by NASCO are certainly outside the reach of this statute. First and most important, only sanctionable acts alleged against attorneys can be considered. Chambers, the principal conspirator, the driving force, and the only person whose interests were served by the conspiracy and the sanctionable acts alleged, is outside the scope of the statute. This alone is sufficient to reject the statute as a basis for our consideration of sanctions. In addition, the act is not broad enough to cover substantive acts against the Court: acts which degrade the judicial system; attempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court, and surreptitious taping of conversations with the Court. In addition, the only type of sanction provided is *excess* costs, expenses and attorneys fees. Sanctions other than expenses and attorney's fees may be more appropriate. We find 28 U.S.C. § 1927 insufficient as a basis for our consideration of the acts alleged in this proceeding to be sanctionable.

35. Inherent Powers. It is well established that Courts possess the inherent power to levy sanctions in response to abusive litigation practices. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). *See Batson v. Neal Spelce Associates,* 805 F.2d 546, 550 (5th Cir.1986); *Huddleston v. Herman & MacLean,* 640 F.2d 534, 559-60 (5th Cir. 1981). *See also, Link v. Wabash Railroad, Co.,* 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *Miranda v. Southern Pacific Transportation Co.,* 710 F.2d 516 (9th Cir. 1983); *McCandless v. Great Atlantic and Pacific Tea Co., Inc.,* 697 F.2d 198 (7th Cir.1983).

The wielding of that inherent power is particularly appropriate when the offending parties have practiced a fraud upon the court.

> The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 88 L.Ed. 1250, 64 S.Ct. 997 [1944]. . . . No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the *entire cost* of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where "for dominating reasons of justice" a court may assess counsel fees as part of the taxable costs. *Sprague v. Ticonic Nat. Bank,* 307 U.S. 161, 167, 83 L.Ed. 1184, 1187, 59 S.Ct. 777 [780] [1939].

Universal Oil Products Co. v. Root Ref'g Co., 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447, 1452 (1946) (emphasis added). *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 239, 245, 64 S.Ct. 997, 1001, 88 L.Ed. 1250, 1255 (1944); *Kupferman v. Consolidated Research &*

Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972); *United Bus. Communications v. Racal-Milgo, Inc.*, 591 F.Supp. 1172, 1187 (D.Kan.1984); *Eppes v. Snowden*, 656 F.Supp. 1267, 1277-79, 1281-82 (E.D.Ky.1986).

Such power is incident to the court's "duty to protect the integrity of the judicial process." *Dolphin Plumbing Co. v. Financial Corp. of North America*, 508 F.2nd 1326, 1327 (5th Cir.1975). *See Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562-63 (3d Cir.1985) (inherent power derives from "judicial powers pursuant to Article III," from "the nature of the court," and from "necessity" or practicality). Accordingly, the inherent power of a court "over members of its bar is at least as great as its authority over litigants." *Roadway Express*, 447 U.S. at 766, 100 S.Ct. at 2464, 65 L.Ed.2d at 501. The Fifth Circuit has held:

> The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. The *Woodham* case [*Woodham v. American Cystoscope Co.*, 335 F.2d 551 (5th Cir.1964)] at p. 557, says that "courts may resort to disciplinary action against the erring attorney," and quotes with approval the following from Sanctions at Pre-Trial Stages, 72 Yale L. Jour. 819, 830:
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> > " * * * In addition, alternative modes of discipline against the attorney might include: (1) a reprimand by the court, (2) a finding of contempt, or (3) a prohibition against practicing for a limited time before the court whose order was neglected or disregarded. It seems fairly clear that the judicious use of such measures would tend to

> promote attorney compliance in the first instance."

Flaska v. Little River Marine Construction Co., 389 F.2d 885, 888-889 (5th Cir.1968), *cert. denied*, 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed.2d 1387 (1968) (footnote omitted).

The *Flaksa* court quoted with approval the dissent of Chief Judge Biggs in *Gamble v. Pope & Talbot*, 307 F.2d 729, 735 (3d Cir.1962) (en banc):

> "The power of a court to discipline members of its own bar can scarcely be doubted seriously. An attorney is under no obligation to seek admission to the bar of a United States district court. He is at liberty to abstain from membership in that or any other bar. But when he does apply and is admitted he secures certain privileges and also assumes definite obligations.
>
> "The power of a court to impose appropriate and reasonable sanctions upon those admitted to its bar is a familiar phenomenon and lies within the inherent power of any court of record. * * * "

Flaksa, 389 F.2d at 888 n. 10. *See also, Roadway Express*, 447 U.S. 766 n. 12, 100 S.Ct. at 2464 n. 12, 65 L.Ed.2d at 501 n. 12 (citing Chief Judge Biggs' dissent in *Gamble* with approval). In *Gamble*, the Third Circuit held that, absent formal contempt proceedings, a district court lacked inherent power to sanction an attorney for violating a court rule. Recently, the Third Circuit noted that *Gamble* had been roundly criticized and rejected and so, overruled *Gamble:* "the importance and necessity of some kind of sanction as one of the reasonable and flexible instruments for curbing abuse of the judicial process suggests

that *Gamble* should no longer control. . . . " *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 568 (3d Cir.1985) (en banc). In short, our inherent authority to discipline attorneys in response to abusive litigation practices cannot, at this late date, be questioned. *See, Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 6 L.Ed. 152 (1824); *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 15 L.Ed. 565 (1856).

"We do not doubt the power of the court to punish attorneys as officers of the same, for misbehavior in the practice of the profession. This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein." *Ex Parte Bradley*, 74 U.S. (7 Wall.) 364, 19 L.Ed. 214 (1869). *See State v. Cannon*, 206 Wis. 374, 240 N.W. 442 (1932) (reviewing cases from the Middle Ages to the nineteenth century on inherent power of courts to disbar attorneys). "The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court." *Theard v. U.S.*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342, 1344 (1957).

> The authority of the court over its attorneys and counselors is of the highest importance. They constitute a profession essential to society. Their aid is required, not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands and confided to their management. The confidence which they receive and the responsibilities which they are obliged to assume, demand not only ability of a higher order, but the strictest integrity. The authority

> which the courts hold over them, and the qualifications required for their admission, are intended to secure those qualities.

Randall v. Brigham, 74 U.S. (7 Wall.) 528, 540, 19 L.Ed. 285, 293 (1869). Finally, as noted by the Supreme Court, "[c]ourts have long recognized an inherent authority to suspend or disbar lawyers." *In re Snyder*, 472 U.S. 634, 643, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504, 512 (1985) (citing *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 378-79, 18 L.Ed. 366 (1867) and *Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 531, 6 L.Ed. 152 (1824)). *See also*, Local Rule 3, Disbarment; *U.S. v. Klubock*, 832 F.2d 649, 652 (1st Cir.1987).[11]

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[11] Where, as here, the allegedly sanctionable acts were committed in the conduct and trial of the very proceeding in which sanctions are sought, no prior notice to the defendants is required. This is the customary procedure and the very procedure followed by the appellate court when, on August 6, 1986, if found the appeal in this case to be sanctionable. The court has the power, without prior notice, to access sanctions in order to regulate and protect its jurisdiction and the orderly and judicious conduct of proceedings before it.

This sanction proceeding is based upon an existing, or preexisting record. The defendants have full knowledge of that record. No prior notice of that record of potentially sanctionable conduct is herein required. Our "power to disbar an attorney proceeds upon very different grounds 'from those which support a court's power to punish for contempt.' " *Cammer v. U.S.*, 350 U.S. 399, 408 n. 7, 76 S.Ct. 456, 460 n. 7, 100 L.Ed. 474, 480 n. 7 (1956) (quoting *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 512, 22 L.Ed. 204 (1873)). Therefore, we hold that criminal contempt procedures are not here required. *See Donaldson v. Clark*, 819 F.2d 1551 (11th Cir.1987). *Cf. Ex Parte Wall*, 107 U.S. 265, 288, 2 S.Ct. 569, 589, 27 L.Ed. 552, 561 (1883) ("The proceeding is not for the purpose of punishment, but for

(Continued on following page)

36. On our own initiative and utilizing the inherent powers of this Court, we have found sanctions, as well as

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the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them.").

Nonetheless, we set a hearing for April 11, 1988 to (1) determine the monetary total of double costs and attorney's fees assessed as sanctions by the appellate court and to (2) determine whether sanctions were appropriate and justified by the conduct of defendants in our Court. All parties were aware that the matter would be tried by this Court on the record and the proceedings in this case, including NASCO's memorandum of fees and expenses which the Court ordered to be filed on or before March 8, 1988. Also on order of the Court, NASCO and the sanctioned defendants presented a defense based on lack of due process or lack of notice of the specific charges. In fact, due process has never been an issue in this matter. However, in our consideration of whether sanctions were appropriate, we determined that the conduct of certain of these defendants and their abuse and misuse of judicial machinery and procedures might require disbarment or suspension from appearance in this Court. Such a sanction obviously would involve governmental deprivation of a liberty or property interest. With this in mind, on December 12, 1988 we notified the parties of the legal basis for sanctions and of the range of sanctions, including disbarment, which we were considering. We invited the parties to submit memoranda of authority on or before December 22, 1988 and such memoranda were duly received from NASCO and from the defendant attorneys.

We have so acted because procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a liberty or property interest. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 787, 28 L.Ed.2d 113, 119 (1971). *Ex Parte Bradley*, 74 U.S. (7 Wall.) 364, 372-74, 19 L.Ed. 214 (1869). But the "very nature of due process negates any concept of inflexible procedures universally applicable to

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the type and amount of sanctions, and in doing so have followed the following criteria:

a. When we have used the word "delay" in our discussions above, we refer to that period ending on the date on which the Act of Sale was finally executed, namely, August 27, 1986. That is the day on which the sale originally envisioned in the Purchase Agreement was finally completed. Although the suit continued thereafter, this continuation was necessary only for the purpose of determining delay damages due NASCO under the laws of the State of Louisiana for CTR's failure to complete the sale until August 27, 1986, and secondly, for the determination of sanctions which is still in progress. The attorney's fees and expenses charged to NASCO by its attorneys for both of these procedures flowed from and

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ever imaginable situation."*Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230, 1236 (1961). *See also, Morrissey v. Brewer*, 408 U.S. 471, 481 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). Instead, the "adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Link v. Wabash Railroad Co.*, 370 U.S. 626 , 632, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734, 739 (1962).

Given the full knowledge of the record possessed by all defendants, given the hearing held on April 11, 1988, and given the opportunity afforded defendants to file further memoranda on or before December 22, 1988, we hold that the requirements of due process have been amply met in this matter.

were a direct result of this suit. We shall include them in the attorney's fees sanctions. *See* note 11 supra.

b. We have limited sanctions against attorneys to those attorneys who were designated or acted as the trial attorneys in this matter. Numerous other attorneys in the firms of these trial attorneys have filed and/or signed pleadings and other papers which appear of record. They may be guilty of sanctionable acts but the record does not disclose the character or the extent of participation by these attorneys. It is certain that many of them signed and/or filed pleadings and papers as a matter of convenience or by the direction of the trial attorney. We consider sanctions in this suit to be a very heavy penalty which should be imposed only after serious consideration based on unimpeachable and weighty evidence and a definite conviction that they are necessary and appropriate under the circumstances in which the sanctioned acts were performed.

c. Certain attorneys may have been charged or mentioned in the sanction proceedings. Considering the fact that these are not criminal proceedings, that this Court is considering very heavy sanctions, that the very fact that the attorney was charged could bring upon him the sting of disrepute, we have determined to make no mention of charges or the names of such attorneys against whom no sanctions are imposed.

d. All attorneys who have been admitted to the bar of the United States District Court for the Western District of Louisiana and who, therefore, appear on the list of attorneys who have been accepted for practice before this Court take either an affirmation or oath of the following

tenor: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counsel of this Court, uprightly and according to law, and that I will support the Constitution of the United States. So Help Me God." One attorney, McCabe, is a resident of and a member of the bar of the State of Massachusetts; was by special order of this Court allowed to represent CTR and Chambers in this proceeding; did not take the oath above but did, we are sure, take a similar oath when he was formally qualified to practice. He, like the other attorneys, is considered an officer of the Court and expected by the Court to conduct himself as such.

e. We have stated above that Fed.R.Civ.P. 11 was amended in 1983 to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of attorneys and reenforcing those obligations through the imposition of sanctions. *Thomas v. Sec. Services, Inc., supra.* The spirit which induced the amendment of Rule 11 in 1983 should not be limited to that Rule. The Courts should not hesitate to address and sanction similar transgressions in whatever the judicial theater they may occur. This case is as classic an example of vicious, deliberate, deceitful, fraudulent and sanctionable conduct as the Courts can produce.

37. Trial by ordeal, that most ancient, most archaic and barbaric practice, has been for centuries in disrepute. We have before us its modern counterpart. Although NASCO did not have to survive the ordeal of boiling water or searing flame without visible harm, it has suffered its modern counterpart. NASCO possessed an admittedly legal and valid contract. Chambers arbitrarily and without legal cause refused to perform, forcing

NASCO to bring its suit for specific performance. Chambers, through his attorneys, filed answers and counterclaims alleging defaults by NASCO which both Chambers and his attorneys knew were false at the time they were filed. We have referred previously to the immense volume of pleadings and evidentiary material in this and other Courts. NASCO suffered delay damages which by agreement of the parties amounted to $850,000.00. NASCO has been forced to spend approximately a million dollars in attorney's fees and expenses in this Court alone to win a suit in which defendants did not introduce one item of evidence to dispute its right to specific performance. This is a trial by ordeal. How many plaintiffs could suffer the oppression and harassment required to fight this case to a finish? The attorneys who engineered this mockery are a disgrace to the profession. This is not rhetoric. This is fact. This is tragedy. Sanctions should be sufficiently severe to convince others that such tactics shall not be tolerated in the Courts of these United States. The sanctions assigned and established in this paragraph apply only to sanctionable acts which occurred in connection with the proceedings in the trial Court.

a. G. Russell Chambers – We need not review the conduct of Chambers. Although this entire opinion is a chronical of his sanctionable acts, these acts, as well as those of the other sanctioned defendants, are recapitulated in brief form in paragraphs 26-28 supra. Chambers, knowing that NASCO had a good and valid contract, hired Gray to find a defense and arbitrarily refused to perform, thereby forcing NASCO to bring its suit for specific performance and injunctive relief. Chambers and Gray misused the notice by NASCO of its application for

injunctive relief to set up the fraudulent public records defense. This was the first battle in their long and arduous campaign of fraud, deceit, delay, harassment, oppression and expense, culminating finally on August 27, 1986 when the sale to NASCO finally was completed. We assess as sanctions for Chambers' unlawful conduct attorney's fees and expenses of $996,644.65. This sum is exclusive and does not include fees and expenses previously awarded by this Court in the contempt proceedings in the amount of $4,754.00, or the attorney's fees and expenses awarded as sanctions by the Court of Appeals which we have determined to be $66,223.02. The figure does include, however, $53,459.68 in attorney's fees and expenses paid by NASCO for services rendered in connection with the sanctions portion of this suit. This latter portion of the fees and expenses, like the balance of such fees and expenses including the sanctions, would not have been incurred by NASCO if Chambers had not defaulted and forced NASCO to bring this suit. There is absolutely no reason why Chambers should not reimburse in full all attorney's fees and expenses that NASCO, by Chambers' action, was forced to pay.[12]

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[12] We have also considered monetary sanctions to compensate the United States for waste of judicial resources caused by this suit. Such sanctions are not without precedent, at least under Rule 11. *See Robinson v. Moses*, 644 F.Supp. 975, 982 (N.D.Ind. 1986); *Dominguez v. Figel*, 626 F.Supp. 368, 374 (N.D.Ind. 1986); *Thiel v. First Federal Savings & Loan Assoc. of Marion*, 646 F.Supp. 592, 598 (N.D.Ind. 1986). In fact, Courts have routinely ordered an award of a part of such costs when settlements are reached on the first day of trial and jury costs are awarded.

These fees and expenses were paid by NASCO to its attorneys. They were assembled, documented and sent to each of the defendants by order of the court on March 8, 1988 and prior to the hearing of April 11, 1988. NASCO paid them without protest and Chambers has not challenged the amount. Nor is it required that the attorney's fees meet the standard set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Davis v. Veslan Enterprises*, 765 F.2d 494 (5th Cir. 1985), and *Hornbuckle v. Arco Oil & Gas Co.*, 732 F.2d 1233 (5th Cir. 1984).

The amount of the sanction is substantial but it is no more substantial than were the bills when NASCO was obliged to pay them. We agree with the statement of Judge Goldberg in *Schwarz v. Folloder*, 767 F.2d 125, 133-134 (5th Cir. 1985), as follows:

> After Alexander Grant's attorney requested attorney's fees, the court sarcastically commented, "You mean to say your client has spent four hundred thousand dollars defending a lawsuit that it determined a long time ago was frivolous?" 13 Rec. at 4. Given this statement, it is possible that the court denied attorney's fees on the ground that Grant was wrong to spend so much money in defending a suit that had been frivolously filed. If so, the district court was in error. We agree with the sentiments expressed in *Dayan v. McDonald's Corp.*, No. 70CH 2258 (Ill. Cir. Ct. March 1, 1983):
>
> > It is unbecoming for the plaintiffs to hail the defendant into court by means of false allegations and then to complain when the defendant hires skillful, experienced and expensive advocates to defend against those allegations. Having wrongfully kicked the

> snow loose at the top, [the plaintiff] must bear the consequences of the avalanche at the bottom.

The shoe fits a frivolous defense as well as it does a frivolous cause of action.

b. Mable Christine Baker – Baker was an indispensable and willing party to the scheme and conspiracy, although she knew none or little of the significance of her participation. Her sanction is our reprimand.

c. A. J. Gray, III – The defendants in this case who are attorneys are distinctly different from the other defendants under consideration. An attorney is schooled in the law. Because of his unique relationship with his clients and with the public, he is taught ethics and governed by rules of professional ethics. The Court has a right to expect him, as an officer of the Court, to lend his assistance in preserving order and decorum in the Court; to be truthful and forthright with the Court and other counsel; to be truthful and not mislead the court or other counsel. His signature certifies that pleadings and other documents filed by him are "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule II [sic]. He is bound to preserve the integrity of the law and the Constitution of the United Sates and the several states and to seek justice in his representation of clients before the Court. In his conduct in this case, Gray has actively violated almost every one

of these ethical and professional responsibilities. He accepted and tried a case for the explicit purpose of doing injustice, i.e., he used every means at his disposal to defeat a perfectly legal and enforceable purchase contract against which he well knew his client had no defenses. He misused the injunction notice given by NASCO. He devised a fraudulent and illegal scheme to deprive this Court of the jurisdiction which it had at the time NASCO's notice was delivered on Friday, October 14, 1983. The sale to the Trust as attempted was an absolute simulation and totally void and incomplete at the time it was recorded. It was recorded in haste for the purpose of rendering the impending injunction ineffective. He not only failed to disclose essential and pertinent facts, he actively misled the Court and recorded his conversation with the Court without disclosing to the Court his intent to do so. By these actions the Court was forced to delay action on the merits until it was determined by trial that the Court again had jurisdiction. During this delay Gray utilized his legal skills and experience to lead, on behalf of Chambers, a campaign of harassment, oppression and delay sufficient to force NASCO to spend over a million dollars in attorney's fees and expenses to defend its rights to the performance of a perfectly legal and enforceable contract. More amazing, this was accomplished without the introduction by defendants of one single item of evidence against the validity of the Purchase Agreement. This case is unique. The manner in which it was conducted by Gray is a disgrace to the legal profession. It is our reluctant duty as a sanction to disbar Gray from practice as an attorney in the Western District of Louisiana; to order that his name be stricken from the roll of the

attorneys authorized to practice before this Court, and that he be prohibited, for a period of three years from the date upon which this case becomes final, from making application for readmission to the rolls of the[?] this Court.

d. Richard A. Curry – Curry knew all the details of the public records defense and participated in the campaign of harassment and oppression. But, he initiated nothing on behalf of Chambers. Customarily he filed his pleadings merely in support of pleadings previously filed by Gray.

Under his representation the Trustee, Baker, remained the willing tool of Chambers through the duration of the litigation and knew no more about her responsibilities as Trustee at the end of the litigation than she did the first day that Curry was hired. We assign as a sanction that Curry be suspended from practice as an attorney in the Western District of Louisiana for a period of six (6) months but that his name remain on the rolls of the attorneys qualified and admitted to the practice before this Court so there will be no need for an application for readmittance.

e. Edwin A. McCabe – McCabe is a resident of and practices law in Boston, Massachusetts. He does not appear on the rolls of the attorneys authorized to practice before this Court but by the order of this Court on July 16, 1986 he was admitted for the purpose of representing Chambers in this specific suit. On this date, some eight months after the issuance of our Judgment on the Merits of November 27, 1985, Chambers was still resisting performance of the purchase contract. We, on motion of NASCO, were lending our assistance to promote that

performance. The sole issue to be tried at the July 16, 1986 hearing was whether operating equipment which had replaced worn or outdated equipment described in the 1983 Purchase Agreement was to be included in the sale to NASCO. The Court had overruled several pretrial motions filed by McCabe and, before commencing the actual hearing warned McCabe that we had experienced a great deal of unethical conduct throughout the trial of this case and would tolerate no further acts of that nature. Despite these warnings, two highly unethical acts occurred during the hearing. During a three day recess after the 16th, all of the equipment at issue in the hearing was removed and taken off line and the worn-out or outmoded equipment described in the 1983 Purchase Agreement was placed in operation. This was done on the admitted advice of McCabe without the consent of the Court or opposing counsel and, indeed without informing either of them. We deemed this to be an act of arrogance, in direct violation of the warning by the Court, and we ordered the immediate reinstallation of the equipment which had been removed.

Thereafter, an attempt was made to prove that the equipment in question was not owned by CTR but was owned by another corporation wholly owned by Chambers and leased at various times since August 1983 by that corporation to CTR. Three witnesses, Mrs. Chambers, CTR's independent CPA and a long-time employee of CTR, testified in support of this contention. It was proved beyond doubt that all of this testimony was perjury, that all of the leases were fraudulent. None of the leases had been drafted or executed prior to 1986, a date which, incidentally, followed our final judgment on the merits.

Thereafter McCabe filed other baseless pleadings and appealed our decision on the July 16 hearing, all as is described in more detail in paragraphs 26, 27 and 28 supra. McCabe terminated his representation when the Appellate Court issued its decree of August 6, 1986. His appeal and all of his pleadings were immediately recalled by him. Nevertheless, his transgressions were serious and we assign as a sanction our severest reprimand against him for his actions, and declare him ineligible to practice in the Western District of Louisiana for a period of five (5) years.

38. We determine the amount of attorney's fees and double costs assessed as sanctions by the United States Court of Appeals for the Fifth Circuit against appellant G. Russell Chambers to be attorney's fees in the amount of $66,159.39, and double costs in the amount of $127.26, accruing in sum to $66,286.65.

39. A certified copy of this Opinion and the Judgment to follow shall be sent by the Clerk of Court to: (1) the Office of Bar Counsel, Daniel Klubach, Board of Bar Overseers of the Supreme Judicial Court, 11 Beacon Street, Boston, Massachusetts 02108, and (2) the Supreme Court of Louisiana, 109 Supreme Court Building, 301 Loyola Avenue, New Orleans, Louisiana 70112-1887.

DONE AND SIGNED.

JUDGMENT

For the reasons set forth in our Opinion this date:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be rendered herein in favor of the movant,

NASCO, Inc., and against respondent, G. Russell Chambers, in the full sum of $66,286.65, representing the amount of the sanctions imposed by order of the United States Court of Appeals for the Fifth Circuit, with interest payable in accord with 28 U.S.C. § 1961.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be rendered herein in favor of the movant, NASCO, Inc., and against respondent, G. Russell Chambers, in the full sum of $996,644.65 as sanctions, representing the total attorney's fees and expenses incurred and paid by NASCO, Inc. in this matter, with interest payable in accord with 28 U.S.C. § 1961.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mable Christine Baker is reprimanded.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that A.J. Gray, III be stricken from the roll of attorneys authorized to practice in the Western District of Louisiana and that he be prohibited for a period of three (3) years from making application for readmission.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Richard A. Curry be suspended from practice in the Western District of Louisiana for a period of six (6) months.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Edwin A. McCabe of the Massachusetts Bar is severely reprimanded and declared ineligible to practice in the Western District of Louisiana for a period of five (5) years.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of Court shall send a certified

copy of this Opinion and Judgment to (1) the Office of Bar Counsel, Daniel Klubach, Board of Bar Overseers of the Supreme Judicial Court, 11 Beacon Street, Boston Massachusetts 02108, and (2) the Supreme Court of Louisiana, 109 Supreme Court Building, 301 Loyola Avenue, New Orleans, Louisiana 70112-1887.

NASCO, INC., Plaintiff-Appellee,

v.

CALCASIEU TELEVISION AND RADIO, INC., and G. Russell Chambers, Defendants-Appellants,

and

Richard A. Curry, Edwin A. McCabe, and A.J. Gray, III, Appellants.

No. 89-4137.

United States Court of Appeals,
Fifth Circuit.

Feb. 6, 1990.

Robert G. Pugh, Pugh & Pugh, Shreveport, La. and Michael H. Rubin, Rubin, Curry, Colvin & Joseph, Baton Rouge, La., for Richard A. Curry.

Mack E. Barham and Robert E. Arceneaux, Barham & Associates, New Orleans, La., and Russell F. Tritico, Lake Charles, La., for Calcasieu Television and Radio, et al.

Michael G. Crow and Michael McGrath Duran, Adams & Reese, New Orleans, La., for Edwin A. McCabe.

John G. Torian, II and Bert Wilson, Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, Lafayette, La., for A.J. Gray, III.

John B. Scofield and David L. Hoskins, Scofield, Bargstedt, Gerard, Mount & Veron, Lake Charles, La. and Jon D. Ross and Aubrey B. Harwell, Jr., Neal & Harwell, Nashville, Tenn., for plaintiff-appellee.

Appeals from the United States District Court for the Western District of Louisiana.

Before WISDOM, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Calcasieu Television and Radio, Inc. and its sole shareholder and director, Russell Chambers, appeal the district court's award of attorneys' fees to NASCO based on Chambers's bad faith in conducting his defense to NASCO's breach of contract suit. 124 F.R.D. 120 (1985). We find that the district court has inherent power to prevent frustration of its judicial duty by a party. We also conclude that, although jurisdiction in this suit rested on diversity of citizenship, the district court may, without reference to Louisiana law, award attorneys' fees to the party forced by the obstructive tactics to incur them. A.J. Gray and Edwin McCabe appeal the district court's order disbarring them for various periods for their conduct of the defense. Richard Curry appeals the Court's order suspending him from practice. We hold that the district court afforded them due process and that its findings are supported by clear and convincing evidence, and affirm the disbarment and suspension orders. In setting the length of McCabe's disbarment the district court considered that he is a resident of Massachusetts and would seldom have occasion to appear in the Western District of Louisiana. After the order was issued, however, the Massachusetts Bar ordered McCabe to show cause why it should not impose identical discipline. We do not know whether this turn of events may work an unintended result. In the interest of fairness, we remand to enable the district court to consider the length of McCabe's disbarment in light of this development.

I

On August 9, 1983, CTR and NASCO agreed to the sale to NASCO of CTR's television station. The agreement required CTR to file required forms with the FCC by a specified date, but it did not do so.

On Friday, October 14, 1983, NASCO notified Chambers that it would file suit in the district court seeking specific performance and would request a temporary restraining order preventing Chambers and CTR from encumbering property subject to the contract. Over the weekend, Chambers and his attorney, Gray, created a trust with Chambers's sister, Mabel Baker, as trustee. CTR then conveyed to the trust all of its immovable property subject to the contract of sale. On Monday morning, Chambers and Gray filed warranty deeds in the proper parish offices showing the transfer to the trust. NASCO filed its suit later that morning. At noon, the district judge conducted a telephone conference with NASCO's attorney and Gray regarding a temporary restraint of property transfers. Gray did not disclose in the conference that CTR was already transferring property to the trust.

On Monday afternoon, Chambers flew to Birmingham, where Baker signed the documents necessary to her appointment as trustee. She then signed a $1.4 million note on behalf of the trust for the purchase of the property.

On Tuesday, Gray informed the court of the transfers and that he had withheld the information during the telephone conference. NASCO amended its complaint to name Baker as a defendant and on October 24, the district

court issued a preliminary injunction enjoining Chambers and CTR from encumbering the property, and an order restraining Baker from alienating or otherwise encumbering the property. On the next day, Baker nevertheless entered into a leaseback agreement with CTR.

In November 1983, NASCO sought access to CTR's general ledger and 1982 income tax return, but Chambers, through Gray, refused. The October 24 preliminary injunction ordered CTR and Chambers to grant NASCO access to any documents or records related to the assets purchased under the contract. The district court held these records were clearly within the scope of the injunction and fined Chambers and CTR after NASCO instituted a civil contempt proceeding. *NASCO, Inc. v. Calcasieu Television & Radio,* 583 F.Supp. 115 (W.D.La.1984). Chambers brought two unsuccessful appeals of this order, under § 1292(b) and § 1291. *See NASCO, Inc. v. Calcasieu Television & Radio,* slip op. No. 84-9037 (5th Cir. May 29, 1984); *NASCO, Inc. v. Calcasieu Television & Radio, Inc.,* 752 F.2d 157 (5th Cir.1985).

The attorneys then filed four motions for summary judgment. Gray filed two on behalf of Chambers, Curry filed one on behalf of Baker, and Gray filed one on behalf of Chambers and Baker. In each motion, they argued that since the deeds of the station's property to the trust had been recorded before the NASCO-CTR contract, the public records doctrine barred specific enforcement of the contract. Before the hearing on the motions for summary judgment, NASCO filed an affidavit attacking Baker's credibility which Curry moved to strike; the court denied the motion. The district court then concluded that the

transfer to the trust was a sham and denied summary judgment.

In August 1984, Gray moved for a protective order and for clarification of the scope of the October 24 preliminary injunction. After a hearing, the court denied that motion as well. Gray then filed on behalf of Chambers several compulsory counterclaims which proved to be baseless; indeed some had no relevance to the proceeding. For example, these claims included arguments that NASCO's conduct of its FCC ascertainment survey was improper, that NASCO would be unable to pay the purchase price, that NASCO had misrepresented its plans for the station, and that NASCO was not committed to the community interest. Chambers and Gray did not drop these claims until the eve of trial, when they admitted the contract was valid.

About the same time, Gray noticed the depositions of officials of Manufacturers Hanover, the financing bank for NASCO's purchase. McCabe, Chambers's Boston counsel, asserted that he took these depositions to determine NASCO's ability to pay the purchase price. Gray also took the depositions of five members of NASCO's board of directors, to determine whether the NASCO officer who had signed the purchase contract had been authorized to do so.

Throughout, Gray sought continuances, extensions of pleading deadlines, and deferments of scheduled discovery. After the district court finally set trial for February 27, 1985, Gray filed a motion to recuse the trial judge for bias and prejudice, which the trial court denied. Chambers and CTR sought a writ of mandamus from this court

ordering recusal. Curry filed an "answer" to the petition on behalf of Baker, who was technically a respondent, in which he also urged that the writ be granted. This court denied the petition, calling it meritless. *In re Calcasieu Television & Radio, Inc. and G. Russell Chambers,* slip op. No. 85-4128 (5th Cir. February 25, 1985). The motion and the petition again delayed the trial. Chambers then listed 100 trial witnesses in the pretrial order. The case went to trial April 17-18, 1985 and only two of the 100 appeared to testify.

At trial, Chambers, CTR, and Baker argued only the public records doctrine defense. The district court rendered judgment on November 8, 1985, restoring the status quo and ordering specific performance. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 623 F.Supp. 1372 (W.D.La.1985). Chambers, Baker, and CTR appealed.

Soon after judgment, Chambers, without notice to NASCO, petitioned the FCC to construct a new transmission tower for the station and to relocate the station's transmission facilities. This change to a new site was not covered by the purchase contract, and would have materially altered the status quo in violation of the district court's judgment. The district court's informal intervention and NASCO's threat to seek further contempt sanctions persuaded Chambers to drop his petition.

On November 27, 1985, Chambers and Baker, through Gray and Curry, moved for a stay of the execution of the judgment pending appeal. The trial court denied the motion, and this court denied writs of mandamus sought by Chambers and by Curry on behalf of the trust. Chambers then petitioned Justice White to stay

the judgment. Justice White denied the petition. *In re Calcasieu Television & Radio, Inc. and G. Russell Chambers v. NASCO, Inc.*, No. A-611 (White, J., in chambers, February 18, 1986) (unpublished opinion). Chambers and CTR fired Gray in March 1986 and Russell Tritico replaced him as their counsel of record. Tritico was later joined by McCabe.

In late spring 1986, while the appeal to this court from the judgment on the merits was still pending, a dispute arose between Chambers and NASCO over the station's equipment to be transferred under the contract. In the nearly three years since the agreement for the sale, several pieces of equipment listed in the contract had been taken out of service. NASCO contended that replacement equipment had to be conveyed, but Chambers refused. NASCO requested the court's aid in completing the sale. On the morning of the resulting hearing, McCabe filed a motion in opposition and a supporting memorandum, a request for jury trial on the motion, and a motion *in limine* to exclude evidence of assets not listed in the contract. The trial court denied these motions, finding them to be frivolous. The court also warned McCabe, who was making his first full appearance in the case, that the defense had already engaged in bad faith, dilatory tactics and the court would tolerate no more.

During the hearing, from July 16-22, Chambers and CTR, at McCabe's direction, removed all of the disputed equipment from service at the station. McCabe now argues that this was to prove that the equipment was not necessary to the station's operations and thus not subject to the contract. Whatever the reason, removing the equipment, without any notice to the court or NASCO, directly

violated the orders of the district court. The district court ordered Chambers and CTR to restore the equipment to service.

At the hearing, two CTR officials, called by McCabe, testified concerning the use and ownership of the disputed assets as part of an effort to prove CTR did not own them but rather leased them from another Chambers corporation, CAL-TV. McCabe introduced seventeen equipment leases as part of this effort. The trial court denied the motion, concluding that the leases were fraudulent and the testimony false. The trial court granted NASCO's motion.

On July 28, 1986, with NASCO's motion pending, McCabe sent a letter to NASCO's counsel stating Chambers intended to close the sale on August 4, 1986 and convey only the assets originally listed in the contract. This apparent effort to set up a termination of the sale by Chambers under the termination provisions of the contract failed. The trial court granted NASCO relief from the timing and termination provisions of the contract.

On August 6, 1986, this court affirmed the district court's judgment on the merits, imposed sanctions under Fed.R.App.P. 38 for a frivolous appeal, and remanded for a determination of the amount of these sanctions. The remand included an instruction to consider the applicability of Rule 11, Fed.R.Civ.P., and 28 U.S.C. § 1927 to Chambers, Baker, or their counsel for their conduct in the trial court. We did not intend by this specific instruction to limit the district court's sanctioning power to that provided in the statute. *NASCO v. Calcasieu Television and Radio*, 797 F.2d 975 (5th Cir.1986).

On December 29, 1987, NASCO moved for sanctions against Chambers, Baker, McCabe, Gray, and Curry resting on section 1927, Rule 11, and the court's inherent power. The court held an evidentiary hearing on the motion on April 11, 1988. All of the parties filed briefs and submitted documentary evidence, affidavits, and testimony. On December 12, 1988, the court filed a minute entry soliciting additional arguments on the availability and propriety of non-monetary sanctions, namely suspension and disbarment of the attorneys. Each party except McCabe responded.

On January 23, 1989, the district court ordered Chambers to pay $66,286.65 in appellate sanctions and $996,644.65 in attorney's fees and related expenses, reprimanded Baker, disbarred Gray for three years, suspended Curry for six months, and declared McCabe ineligible to practice in the Western District of Louisiana for five years. The court did not rest a statute or rule, but found that it had the inherent power to issue the order. Louisiana and Massachusetts have ordered Gray and McCabe respectively to show cause why they should not impose identical discipline. Those orders have been stayed pending the outcome of this appeal.

II

Chambers argues that the district court's award of attorneys' fees was not authorized by controlling Louisiana law. He contends that in a diversity case, a district court may not impose attorney's fees for bad faith litigation practices under its inherent power, but must look to state law. Louisiana allows attorneys' fees only when a

contract or statute specifically provides for them. *Quealy v. Paine, Webber, Jackson, and Curtis, Inc.*, 475 So.2d 756 (La.1985); *Huddleston v. Bossier Bank and Trust Co.*, 475 So.2d 1082 (La.1985). It does not recognize an exception for bad faith practice. It is undisputed that neither the contract nor any Louisiana statute here provides for attorneys' fees.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the Court noted that federal courts follow the "American Rule" that the prevailing party is not permitted to recover attorneys' fees, with a few exceptions, including an inherent power to impose attorneys' fees upon a losing party who has acted " 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' " 421 U.S. at 258-259, 95 S.Ct. at 1622 (quoting *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974)). This exception applies both when the bad faith occurs in the transaction giving rise to the suit and when a party litigates in bad faith. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980). A footnote, however, confuses the *Alyeska* ruling at least in diversity cases:

> "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." Prior to the decision in *Erie R. Co. v. Thompkins*, 304 U.S. 64 [58 S.Ct. 817, 82 L.Ed. 1188] (1938), this Court held that a state statute requiring an award of attorneys' fees should be applied in a

> case removed from the state courts to the federal courts: "[I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts." . . . We see nothing after *Erie* requiring a departure from this result. The same would clearly hold for a judicially created rule, although the question of the proper rule to govern awarding attorneys' fees in federal diversity cases in the absence of state statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule.

421 U.S. at 259, n. 31, 95 S.Ct. at 1622, n. 31 (citations omitted).

We are not persuaded that the Court intended to upset the view, nigh unchallenged in the history of the country, that federal courts have inherent power to police themselves by civil contempt, imposition of fines, the awarding of costs and the shifting of fees. Specifically, we are unpersuaded that the award of fees to a party injured by the opposing party's conducting a civil suit in a manner obstructive of justice necessarily implicates the substantive policy of states in diversity cases.

It is a given that federal courts enjoy a zone of implied power incident to their judicial duty. From the Judiciary Act of 1789 forward its functional necessity has not been seriously questioned. Rather, the task is one of defining its limits. As we see it, the dimensions of the

zone are best grasped by taking both a horizontal and a vertical look. The immediate contention, that awarding fees implicates Louisiana's substantive policy, raises a question of vertical limits. But its answer requires the informing presence of horizontal limits; that is, the relationship between the source of the power and its particularization in rules governing sanctions such as Rule 11 and Rule 37, Fed.R.Civ.Proc., in rules governing contempt, and in statutes such as 28 U.S.C.A. § 1927. We turn first to the relationship between the courts' inherent power to prevent obstructive conduct and particular rules that respond to such conduct at various stages of the litigation process. We limit our discussion to the problem before us – whether Rule 11 and Section 1927 bar a district court from assessing fees against a party under its inherent power, when the party's conduct is not within the reach of the rule or the statute. We express no opinion whether, when the conduct is within the reach of either, the court may exceed these boundaries under the auspices of its inherent power.

It could be argued that the inferior federal courts may look only to rules of procedure and specific statutes providing remedies for obstructive conduct. The argument rests on the idea that Congress has the power to define the limits of the authority of inferior courts and that § 1927 and applicable rules adopted under the enabling acts reflect a congressional decision to confine the courts to the particular rules and statutes. After all, the argument goes, there is little point in defining procedures and remedies by particular rules if the courts retain a much broader "inherent power." We are not persuaded.

To the extent that inherent power is seen as a product of necessity, it contains its own limits. It is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function. It is power "*necessary* to the exercise of all others," *Roadway Express*, 447 U.S. at 764, 100 S.Ct. at 2464, 65 L.Ed.2d 488 (1980) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch), 32, 34, 3 L.Ed. 259 (1812)) and "governed not by rule or statute but by the control *necessarily* vested in courts to manage their own affairs." *Link v. Wabash R. Co.*, 370 U.S. 626, 630, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962) (emphasis supplied).

Despite its linkage to necessity, it is not apparent that the inherent power is exhausted by rules addressing particular sets of problems, such as Rule 11. It is true that, to the extent conduct violates an explicit statute or rule, there is no necessity for resorting to power inherent in the judicial assignment. At the same time it does not necessarily follow that inherent power starts where rule or statute ends. Conduct may be of the genre addressed by the rule, such as an inadequate investigation preparatory to the filing of a complaint or bad faith prosecution of a claim, but outside its particulars such as the required signing under Rule 11 or conduct by a party rather than the lawyer under § 1927. Indeed, were the power at issue here reflected in a rule of procedure, much of our analysis would be unnecessary.

Accepting that Congress can limit the power, the question inevitably turns to the intended purpose of the rule. Yet, the scope of displacement intended by a rule is often uncertain. Indeed, it is likely to be uncertain unless the statute or rule explicitly describes its preemptive

reach. This is so because adopting a rule of procedure such as Rule 37 is not necessarily inconsistent with simultaneously accepting a court's inherent power to shift fees for wanton and vexatious conduct. First, adopting a rule alters the analysis of judicial reach in diversity cases, at least since *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). For this reason alone, the inference that an *addition* of congressional authority to the inherent judicial power was intended by the promulgation of a rule is at least equally as compelling as the inference that adopting the rule was intended to supplant the court's inherent power.

Second, the positive heuristic values of particularizing conduct that could without the rule be dealt with by a court's exercise of inherent power also dispels the notion that adopting a rule necessarily infers an intent to displace inherent power.

Third, and finally, adopting particular rules supplements inherent power in another positive manner that is the essence of rulemaking. A rulemaker may sum experiences such as inadequate investigation preparatory to the filing of a pleading and condemn its practice despite the fact that singly the acts might not be so obstructive as to warrant ad hoc judicial responses. It follows that misconduct by parties as distinguished from their lawyers had not been found to be sufficiently widespread as to warrant a rule that hardly compels the inference that when it does occur, the court lacks inherent power to deal with it because the subject was addressed by a rule and the rule omitted parties. Similarly, a rule maker may reach for practices in their bud, before they come to flower. Where a rule leaves off and the zone of inherent power picks up

is not definable across the board – for all rules and statutes – and is often uncertain. That uncertainty is a reflection of uncertainty in the very idea of inherent power. At the very least it leads us to not venture beyond functional necessity at its source.

Given this uncertainty, it ought not be surprising, and it is the case that, viewed horizontally, inherent power is not a tidy doctrinal package. Two cases make the point. In *Link* the Court sustained a lower court finding of the inherent power of a district court to enter an involuntary order to dismiss a sua sponte case involuntarily. That Rule 41(b) dealt with involuntary dismissals and appeared to require a motion to dismiss did not trouble the Court. Justice Harlan observed that Rule 41 was not the source of the power to dismiss. Rather, the district court had exercised its inherent power. On the other hand, the Court in *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 22 L.Ed. 205 (1873), suggested that the rules for contempt, a specie of inherent power, were the sole source of district court authority to find contempt. That the district court could not have proceeded with contempt except by the rules for contempt does not necessarily mean, however, that it had no authority to otherwise remedy the conduct. So read, *Ex parte Robinson* and *Link* are not inconsistent. By this reconciliation, when a court is faced with bad conduct frustrating its ability to discharge its judicial duty, it is not confined to the process of criminal contempt, but may impose other sanctions in order to control the litigation before it.[1]

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[1] We need not grapple here with the preclusive effect of the Rule 42 Fed.R.Crim.P. and 18 U.S.C. § 401. This was not a

(Continued on following page)

Our task here is not so large that we must quiet these uncertainties. Rather, it is sufficient that we explain our caution by describing concerns surrounding the inherent power of federal courts. Having said this, and despite the uncertainty of the inherent power's full reach, we are persuaded that the rules of civil procedure and § 1927 did not displace a district court's power to shift fees for bad faith wanton and vexatious conduct in the prosecution of the case. We quickly take comfort from the reality that this much is implicit in *Alyeska*.

We turn now to the vertical view and our immediate issue – whether, as Chambers argues, the *Alyeska* Court read *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny as compelling district courts to look to state law in awarding attorney's fees for bad faith litigation practices in diversity cases. We are not persuaded that it did.

Erie broadly commanded federal diversity courts to apply state substantive law and federal procedural law. The current state of the *Erie* doctrine is reflected in *Guaranty Trust Co. v. York*. 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) and *Hanna v. Plumer, supra*. In *Guaranty Trust Co.*, the Court held that, in diversity cases, *Erie* required issues significantly affecting the outcome of the litigation to be decided under state law. On the other hand, issues concerning the manner and means of enforcing the state-created substantive right in federal court were to be

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(Continued from previous page)

criminal contempt proceeding and there is no suggestion that the full range of conduct could be remedied by civil contempt.

determined by federal law. 326 U.S. at 109, 65 S.Ct. at 1469. In *Hanna*, the Court refined this analysis after conceding that every procedural issue could be outcome-determinative in the proper context. The Court stated that when, as here, no federal rule controls and *Erie* analysis is therefore necessary, the outcome-determination test "cannot be read without reference to the twin aims of the *Erie* rule – discouragement of forum shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468, 85 S.Ct. at 1142.

Predictably, the circuits have not been even in their treatment of the issue. In *Tryforos v. Icarian Development Co., S.A.*, 518 F.2d 1258 (7th Cir.1975), *cert. denied, Manta v. Tryforos*, 423 U.S. 1091, 96 S.Ct. 887, 47 L.Ed.2d 103 (1976), the court considered a fee award in a shareholder's derivative action under state law for misappropriation. The plaintiff shareholders changed attorneys frequently during the litigation and otherwise sought to avoid a trial on the merits in the district court, apparently preferring some other forum. Finally, they sold their stock and, despite some objections from another shareholder, the district court dismissed the action with prejudice for failure to prosecute. The district court retained jurisdiction to award defendants $92,500 in attorneys' fees. The Seventh Circuit reversed. The court rejected the defendants' assertion that federal law governed the award, concluding that the *Alyeska* footnote required it to apply Illinois law. 518 F.2d at 1265, n. 27. The court concluded that the Illinois statute allowing fees in that circumstance did not cover the plaintiff's conduct. *Id.* at 1266.

In *Lewis v. S.L. & E., Inc.*, 629 F.2d 764 (2d Cir.1980), the court reversed a judgment on the merits in favor of

the defendants in a shareholder's derivative action. The court also reversed the attorneys' fee award, saying that it could not find a New York statute that allowed the defendants to recover their fees in this kind of derivative action; and if the district court made the award because it thought the plaintiffs brought the action in bad faith, the reversal on the merits removed that basis for the award. 629 F.2d at 773. In a footnote, the court stated "In this diversity action, state law governs the question of attorneys' fees," citing the *Alyeska* footnote. *Id.*, n. 21.

In *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818, 107 S.Ct. 79, 93 L.Ed. 2d 34 (1986), the plaintiff sued NBC, the Anti-Defamation League of B'Nai B'Rith, and others in a diversity action alleging defamation. He lost, and the Anti-Defamation League moved for sanctions in the form of attorneys' fees against plaintiff and his attorneys under Rule 11, § 1927, and the district court's inherent power to cope with bad faith litigation. The district court denied the motion and the Fourth Circuit affirmed, finding no abuse of discretion. The court apparently assumed the district court could have imposed sanctions under its inherent power. *See* 780 F.2d at 1140.

In *Montgomery Ward v. Pacific Indemnity Co.*, 557 F.2d 51 (3d Cir.1977), the defendant insurer Pacific refused to defend Montgomery Ward in a products liability action. Montgomery Ward sought a declaratory judgment that Pacific was required to defend or indemnify and to recover attorneys' fees for both the products liability action and the declaratory judgment action. The products liability action was settled and Pacific indemnified Montgomery Ward and paid its counsel fees for that action.

Montgomery Ward continued to prosecute the declaratory judgment action to recover its fees for that action. The district court awarded the fees for what it found to be Pacific's bad faith, based on its own inherent power rather than any authority derived from state law. The Third Circuit affirmed the award because it was valid under state law, but noted the district court's use of its inherent power was improper in that state law governs attorneys' fees awards in diversity cases. 557 F.2d at 56-58. Judge Gibbons concurred in the judgment, but did not agree that federal courts were *Erie*-bound to apply state law when the bad faith amounted to an abuse of process:

> I do not agree, however, that in a state which would not [recognize the bad faith exception], a federal forum would be precluded from awarding attorneys' fees for what amounts to a vexatious abuse of its process. I regard the award of attorneys' fees [here] as more in the nature of costs than are such awards under the other exceptions to the American Rule. Certainly the notions of federalism which underlie the *Erie* rule do not require that a federal forum accept the public policy of the state in which it happens to sit on a matter such as the award of costs for abuse of its process.

557 F.2d at 61.

Judge Gibbons viewed Pacific's refusal to defend or indemnify, and its defense of that position in the declaratory judgment section, as an abuse. The district court took the same approach in *Republic of Cape Verde v. A. & A. Partners*, 89 F.R.D. 14, 30 n. 12 (S.D.N.Y.1980).

Judge Gibbons did not distinguish between two aspects of the bad faith exception. As we see it, bad faith is an underlying transaction and bad faith in the prosecution of a claim present quite different problems. That is not to say that conduct in prosecuting a claim is inevitably a non-substantive matter. Federal judgments about whether a contention is substantial or frivolous can quickly implicate state choices of policy. The "procedural" trace of state policy in a federal decision is evident in the use by states of private attorneys general to enforce state standards. A state may set a low threshold to encourage such policing. A finding of bad faith prosecution as a predicate for fee-shifting when it rests on the substantiality of the contention is intertwined with state choices among means of enforcing standards for corporate conduct. *Tryforos* and *Lewis, supra,* (shareholder derivative actions) may be explained in these terms. In sum, the dichotomy of underlying transaction versus trial does not evenly separate substance from procedure and we do not suggest that it does. This is also the rationale of this circuit. *Perkins State Bank v. Connolly,* 632 F.2d 1306 (5th Cir.1980) is not contrary. It bears emphasis that the question before the panel in *Perkins* was whether bad faith in the commercial transaction giving rise to the suit triggered fee-shifting. Fee-shifting is in that circumstance a substantive policy choice by the state. The panel properly looked to Florida law for the answer.

In this case, however, the award was based on Chambers's bad faith in the manner of conducting the litigation; it did not rest on a federal measuring of the merit in Chambers's defense. We do not see how the district court's inherent power to tax fees for that conduct can be

made subservient to any state policy without transgressing the boundaries set out in *Erie, Guaranty Trust Co.*, and *Hanna*. Fee-shifting here is not a matter of substantive remedy, but of vindicating judicial authority. Of course, use of inherent power is outcome determinative in the sense that Chambers owes fees he would not have owed had Louisiana law applied; but that is not the question after *Hanna*. *Erie* does not compel a federal court to tolerate abuses in diversity cases that the court would not tolerate in other cases; nor does it limit the range of measures at the court's disposal to vindicate its authority. It is not the business of the state and federal courts to run the other's courtroom.

Courts have approved other uses of the inherent power to control the litigation in diversity cases. In *Link v. Wabash R. Co., supra,* for example, there is no discussion of the effect of state law on the court's power to dismiss that diversity suit. *Williams v. New Orleans Public Service, Inc.*, 728 F.2d 730 (5th Cir.1984). We approved the exercise of the inherent power in a diversity case to declare parties absent from docket call ready for trial, again without discussion of state law. In *Jochum v. Schmidt*, 570 F.2d 1229 (5th Cir.1978), a diversity case, we affirmed the district court's exercise of its inherent power to condition a voluntary nonsuit on the payment of costs, including attorneys' fees.

In *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *rehearing denied* 765 F.2d 154, cert. denied 474 U.S. 948, 106 S.Ct. 347, 88 L.Ed.2d 294 (1985), the court held that federal forum non conveniens doctrine applied in diversity actions, in the face of an *Erie* challenge. A dismissal under that doctrine is an exercise of the court's inherent

power. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

The point is that the exercise of the federal inherent power in these cases, as in this one, in an effort to control the litigation does not foster the forum shopping and inequitable adminstration of the laws *Erie* was designed to prevent. *Erie* guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court. It does not allow him to waste the court's time and resources with cantankerous conduct, even in the unlikely event a state court would allow him to do so.

III

Chambers contends there was insufficient evidence to support the district court's conclusion that he litigated in bad faith. We disagree. He was the central figure in the creation of the trust, the sham transfer of the station's assets to it, and the almost immediate leaseback. While some of this conduct arguably occurred before the lower court acquired jurisdiction, it continued thereafter. In arguing the baseless recusal motion, Gray indicated he had filed it at Chambers's insistence. Chambers's petition to the F.C.C. to build a new transmission tower was in direct violation of the district court's order.

There was also evidence to support the district court's conclusion that Chambers was heavily involved in the fraudulent leases and false testimony presented at the hearing on the motion for judicial assistance. The corporation that allegedly owned the disputed equipment had

no employees and had never engaged in production activities. The leases were rather obviously backdated – for instance, Chambers's wife signed one of them in her married name, but it was dated before their marriage.

Even making the dubious assumption that Chambers had nothing to do with the other litigation tactics the attorneys undertook, this evidence sufficiently supports a finding of bad faith. The district court did not err.

Finally, Chambers contends the amount of the sanctions was an abuse of discretion. We disagree. NASCO's expenses throughout this litigation were without exception the product of Chambers's bad faith tactics. The award reflects the amount of these expenses.

IV

Gray, McCabe, and Curry argue that the disbarment and suspension proceedings violated due process. They say they did not have adequate notice that the court was considering disbarment; they assert that they participated in the sanctions hearing under the impression that they were defending only against monetary sanctions and did not know until the minute entry of December 12 that they also faced disbarment or suspension. Gray and Curry contend they were not given adequate notice of the conduct for which they faced disbarment or suspension. Finally, Gray argues the April 11 hearing was inadequate for disbarment purposes because it was limited to one day and it was prosecuted by NASCO's attorneys.

A

The appellants rely primarily on *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), to support their claim that the notice of their potential disbarment or suspension in the minute entry was inadequate. Ruffalo had been disbarred by the Supreme Court of Ohio on two charges relating to his alleged solicitation of clients for FELA cases. One charge had originally been presented to the State Board of Commissioners on Grievances and Discipline; the board added the other during the hearing, after Ruffalo had presented his defense. The Sixth Circuit then disbarred him based solely on the charge the board added during the hearing. The Court held the Sixth Circuit erred because Ruffalo had not been given adequate notice of this charge or an opportunity to defend it. 390 U.S. at 550-551, 88 S.Ct at 1225-1226.

Here, Gray, McCabe, and Curry were informed of the charges for which they were subject to sanctions when NASCO filed its motion for sanctions on December 28, 1987. They presented their defenses to the charges at the hearing on monetary sanctions on April 11, 1988. They were later informed that the court was considering disbarment or suspension for the same offenses and were allowed to file briefs on that question.

We hold the appellants were afforded due process. They had adequate notice of the charges and were allowed to present a defense to each one of them at the hearing. The only question they were not allowed to argue at the hearing was whether their conduct subjected them to disbarment or suspension. The district court remedied that by allowing them to file briefs devoted to

the issue after the minute entry. We see no defect in these proceedings.

B

Gray and Curry claim that NASCO's motion did not adequately inform them of the charges, but merely made vague and general allegations of misconduct over the course of the litigation by all of its opponents. We disagree. NASCO's motion contained four pages of allegations of specific instances of misconduct. Gray or Curry or both were alleged to be responsible for many of the acts listed.

C

Finally, Gray's argument that the hearing was inadequate also fails. First, we see no indication that he was in any way prejudiced because the hearing lasted only one day. Since the misconduct alleged occurred in the court, there was no need for elaborate proof of the facts, and the parties offered none. Gray was given an opportunity to call any witnesses he wished and to take the stand himself. He chose not to. Second, we are not persuaded that NASCO's "prosecution" of the sanctions proceeding violated the strictures of *Young v. United States*, 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). There the Court held the appointment of the opposing counsel in the underlying litigation to prosecute a criminal contempt proceeding violated due process. The Court reasoned that counsel could not adequately represent the interests of the government and the interests of his private client at the same time. 107 S.Ct. at 2135-2139. Gray argues that

because we have characterized a disbarment proceeding as quasi-criminal, *In re Thalheim*, 853 F.2d 383, 388 (5th Cir.1988), the reasoning in *Young* should apply.

We are unable to find any authority to support Gray's contentions and he points us to none. Further, we conclude that the danger present in *Young*, that private counsel would be overzealous in the contempt proceedings in an effort to further the interest of his client, was not present here. The arguments of counsel at the hearing were devoted entirely to the issue of monetary sanctions. The court later relied on its own research, aided by any briefs the parties wished to file, in determining the propriety of nonmonetary sanctions. 124 F.R.D. at 137, n. 10. The court thus avoided placing NASCO's counsel in the role of prosecutor for the disbarment proceedings.

V

Gray, McCabe, and Curry next argue that the evidence was insufficient to support their respective disbarments and suspension. The district court could have disbarred them only on the strength of clear and convincing evidence that they committed a disbarment offense. *Thalheim*, 853 F.2d at 389, n.9. We hold there was sufficient evidence to disbar.

There is no dispute that the appellants did everything the district court said they did. The district court found that they did it in bad faith, for the purpose of delaying an inevitable judgment against their clients. We have examined the record, and have concluded that clear and convincing evidence supported that finding. All three men repeatedly urged the frivolous public records

doctrine defense. McCabe displayed disregard for the authority of the court by removing the disputed equipment from service at the station. McCabe also introduced fraudulent leases and testimony, characterized by the district court as "perjury." Gray and Curry made baseless arguments for recusal of the district judge. Gray noticed numerous needless depositions. Every act they undertook was to further the fraud on NASCO and on the court begun by the sham transfer to the trust. Their protestations that they acted in a good faith effort to defend their clients are not sufficient to overturn their disbarments and suspension in the face of this evidence.

VI

Finally, McCabe argues the district court abused its discretion by disbarring him for five years. He cites *Thalheim* to support his contention that his conduct did not render him morally unfit to practice law, and he should not have been disbarred, or at least not for that long.

We note that the district court, in denying all motions for new trial on the sanctions issue, stated "McCabe's sanction was affected by the fact that he is a non-resident of the State of Louisiana, is not a member of the bar of this court; and by the probability that he rarely appears before this court." R. 3762. We are concerned that the district court may not have anticipated that the Massachusetts Bar would similarly discipline McCabe. Therefore, without expressing an opinion on the propriety of a five year period of disbarment on the facts of this case, we remand to allow the district court to further consider

the length of McCabe's disbarment in light of any action, or contemplated action, by the Massachusetts Bar.

AFFIRMED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-4137

NASCO, INC.,

Plaintiff-Appellee,

versus

CALCASIEU TELEVISION & RADIO, INC.
and G. RUSSELL CHAMBERS,

Defendants-Appellants.

and

RICHARD A. CURRY, EDWIN A.
McCABE, and A.J. GRAY, III,

Appellants.

Appeals from the United States District Court
for the Western District of Louisiana

ON PETITIONS FOR REHEARING AND SUGGESTIONS
FOR REHEARING EN BANC

(Opinion February 6, 1990, 5th Cir., 1990 ___ F.2d ___)

(May 4, 1990)

Before WISDOM, JOHNSON, and HIGGINBOTHAM,
Circuit Judges.

PER CURIAM:

The petitions for rehearing en banc are denied, no active member of the court having requested a poll, the petitions for panel rehearing are denied except upon

further consideration of Richard A. Curry's petition for panel rehearing, we remand the case, as to Curry only, to the district court for reconsideration.

Curry vehemently denies that his conduct subjected him to suspension under the court's inherent powers; he protests that he did little more than sign pleadings. He insists that he did not receive an adequate opportunity to defend himself. We are persuaded that we should remand the case as to Curry only. On remand the district court will allow Curry to offer any relevant argument and evidence he may have. The district court may then reinstate, supplement or change its present findings and any ordered sanctions as it finds appropriate. We do not hold that the imposed sanction was an inappropriate response to the district court's perception of Curry's role. Curry seeks a further opportunity to dispel that perception. We do no more than allow him to do so, perhaps out of an excess of caution.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NASCO, INC.	:	CIVIL ACTION
-vs-	:	NO. 83-2564
CALCASIEU TELEVISION AND RADIO, INC. ET AL	:	JUDGE SCOTT

RULING

(Filed Aug. 20, 1991)

Before the Court are three separate motions for reconsideration of sanctions imposed by this Court against A. J. Gray, III (Gray) and Edwin A. McCabe (McCabe), attorneys for defendants Calcasieu Television & Radio, Inc. (CTR) and G. Russell Chambers (Chambers), and against Richard A. Curry (Curry) attorney for defendant Mabel Christine Baker, trustee (Baker). We have considered these motions along with the supporting memorandums and the testimony and documentary evidence presented by Gray and Curry at the evidentiary hearing of July 6, 1990. McCabe was not present or represented at that hearing.

A. J. Gray, III

1. Gray knew that the purchase agreement by CTR and Chambers in favor of Nasco was a good and valid contract. Gray was the architect of the scheme of delay, expense and harassment. He was also the architect

of the scheme and conspiracy to form a third party trust and sell CTR's operating properties to that third party trust so that the Court would no longer have jurisdiction of that property and Nasco would be deprived of a trial on the merits of its specific performance suit. Gray's motion is denied.

Edwin A. McCabe

1. In its Opinion of February 6, 1990, *NASCO, Inc. vs. Calcasieu Television and Radio* (5th Cir. – February 6, 1990) 894 F.2d 696, the Appeals Court stated:

> We note that the district court, in denying all motions for new trial on the sanctions issue, stated "McCabe's sanction was affected by the fact that he is a non-resident of the State of Louisiana, is not a member of the bar of this court; and by the probability that he rarely appears before this court." R. 3762. We are concerned that the district court may not have anticipated that the Massachusetts Bar would similarly discipline McCabe. Therefore, without expressing an opinion on the propriety of a five year period of disbarment on the facts of this case, we remand to allow the district court to further consider the length of McCabe's disbarment in light of any action, or contemplated action, by the Massachusetts Bar.

2. At the time of our Ruling dated February 15, 1989, we had no idea of the frequency of McCabe's professional appearances in the State of Louisiana. We had no knowledge that he had ever appeared professionally

in the State of Louisiana prior to this proceeding or whether he intended to appear here professionally at any time in the future. Certainly he was free to avoid any professional appearance in Louisiana in the future. McCabe immediately after the Court's warning in the July 1986 hearing, was guilty of unauthorized removal of equipment at issue and the introduction of fraudulent leases and he resumed the program of delay, expense and harassment of Nasco. Every act which he performed in the short period of his practice before this Court can be characterized as calculated and deliberate unethical conduct. We intended to assure that the sanction imposed would not amount to a mere slap on the wrist. Although we feel that the sanction imposed upon McCabe is reasonable under the circumstances of this case, we acknowledge that it might have been less had McCabe been a resident of the State of Louisiana. However, it is the business of the State of Massachusetts, not this Court, to determine what period of suspension or disbarment is appropriate for a resident attorney practicing in Massachusetts. McCabe's motion is denied.

Richard A. Curry

1. In its PER CURIAM of May 4, 1990, the Court of Appeals stated:

> *The petitions for rehearing en banc are denied, no active member of the court having requested a poll.* The petitions for panel rehearing are denied except upon further consideration of Richard A. Curry's petition for panel rehearing, we remand the case, as

> to Curry only, to the district court for reconsideration.
>
> Curry vehemently denies that his conduct subjected him to suspension under the court's inherent powers; he protests that he did little more than sign pleadings. He insists that he did not receive an adequate opportunity to defend himself. We are persuaded that we should remand the case as to Curry only. On remand the district court will allow Curry to offer any relevant argument and evidence he may have. *The district court may then reinstate, supplement or change its present findings and any ordered sanctions as it finds appropriate. We do not hold that the imposed sanction was an inappropriate response to the district court's perception of Curry's role.* Curry seeks a further opportunity to dispel that perception. We do no more than allow him to do so, perhaps out of an excess of caution.

This Court is deeply conscious of the seriousness of the sanctions imposed upon each of the defendant attorneys. We respect the similar concern of the Court of Appeals. It is our opinion that the evidentiary hearing of July 6, 1990 has at least laid to rest the issue of due process.

2. No additional pleadings were filed by Curry following the May 4, 1990 partial remand of the Court of Appeals. However, in accordance with the directives of the remand of May 4, 1990 and of the judgment of the Court of Appeals of February 6, 1990, we set a hearing for July 6, 1990 to receive additional evidence from McCabe, Curry, and Gray. Since the Court of Appeals had granted

McCabe and Curry the right to produce additional evidence, when Gray requested similar consideration, we felt that he should be accorded the same privilege and granted his request. Prior to the hearing, we received motions from Gray and McCabe. McCabe was not present or represented at the hearing.

3. On August 6, 1986, the Court of Appeals heard oral argument on the appeals from our November 8, 1985 opinion on the merits.[1]

At the close of the oral argument the Court ruled from the bench, affirming, *per curiam*, the District Court's judgment (reserving the right to submit written reasons), declaring the defendants' appeals to be frivolous, imposed appellate sanctions against Chambers and Baker pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1912 in the form of attorney's fees and double costs, and remanded the case with instructions to the lower Court to fix the amount of the appellate sanctions and to determine whether further sanctions should be imposed against the defendants and/or their counsel for the manner in which the litigation was conducted in the District Court.[2]

In fulfilling the mandate of the Court of Appeals, we did not, in our sanctions opinion of January 23, 1989[3] restate all the findings and conclusions stated in our merits opinion of November 8, 1985. Following the same methodology, we did not include in this opinion, the Findings of Fact and Conclusions of Law expressed in the two opinions above referred to.

4. On August 27, 1986, the Court of Appeals acted on its reservation and issued an unreported written opinion containing the following language:

The district court's opinion in this case adequately reflects our view of the merits of this case. . . .

A primary reason that this appeal is so clearly frivolous and was pursued for the purpose of delay *lies in the nature of the facts, facts that the district court determined clearly and accurately. . . . The facts themselves, however, so overwhelmingly support the district court's conclusions and findings that any appeal that must characterize its factual determinations as clearly erroneous is plainly frivolous.*

The frivolousness of this appeal and its dilatory purpose is further demonstrated by the bad faith shown by the appellants before and during this litigation. The validity of the purchase agreement, its unjustified breach, and the eleventh hour creation of a sham trust to avoid that agreement in the shadow of approaching legal proceedings were not contested by the appellants. These actions plainly show that the appellants intended to manipulate the legal process to escape their own voluntarily undertaken obligations. *The appellants' legal arguments were singularly unconvincing in view of the glaring facts that the arguments ignored.* The arguments relied on the trust that the district court found was created for the sole purpose of avoiding the sale to NASCO. . . . As judges, we cannot check our common sense in the robing room and allow disingenuous arguments to characterize as serious an appeal as manipulative as is the one before us.

NASCO, Inc. v. Calcasieu Television and Radio, Inc., No. 86-4003, slip op. at 2-3 (5th Cir. Aug.

> 27, 1985) (*per curiam*) (unpublished opinion affirming judgment on the merits) (emphasis added).
>
> The trial court's findings of fact and conclusions of law, having been resoundingly affirmed by this Court on appeal, are conclusive. They cannot now be challenged on these appeals.

5. We have considered the arguments and evidence produced by Curry to determine whether we should reinstate, supplement or change our original findings. We find nothing in the documentary evidence or in the testimony of witnesses Curry and Fornias or in the closing argument at the July 6, 1990 hearing which would have even a slight effect on our original findings.

6. We find that Curry has violated Rule 1.2(c); Rule 1.16(a)(1); (b)(1), (2) and (3) and Rule 8.4(c) and (d) of the Rules of Professional Ethics of Louisiana State Bar Association, Title 37 L.S.A. Ch. 4.

CONCLUSION

We reinstate our original findings and conclusions without change or alteration and we confirm our original sanction as set forth in the sanctions Opinion and our sanctions Judgment dated January 23, 1989.

DONE AND SIGNED at Alexandria, Louisiana, this 18th day of August, 1990.

/s/ Norman S. Scott
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] This Court issued its Opinion on the merits on November 8, 1985, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 623 F. Supp. 1372 (W.D. La. 1985), and Judgment was signed on November 27, 1985.

[2] *See NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, No. 86-4003 (5th Cir. Aug. 6, 1986) (*per curiam*) (unpublished Order); *id.* (5th Cir. Aug. 11, 1986) (*per curiam*) (unpublished Order amending Order of Aug. 6, 1986); (5th Cir. Aug. 27, 1986) (*per curiam*) (unpublished Opinion affirming Judgment on the merits).

[3] *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120 (W.D. La. 1989).

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NASCO, INC.	:	CIVIL ACTION
-vs-	:	NO. 83-2564
CALCASIEU TELEVISION AND RADIO, INC. ET AL	:	JUDGE SCOTT

JUDGMENT

(Filed Aug. 20, 1991)

Due consideration having been given to the evidence, testimony and argument adduced at the evidentiary hearing of July 6, 1990; for written reasons this day assigned; it is

ORDERED, ADJUDGED AND DECREED that the sanctions imposed on Richard A. Curry in our Judgment of January 23, 1989, by and they are hereby reinstated and confirmed.

Alexandria, Louisiana, this 18th day of August, 1990.

/s/ Norman S. Scott
UNITED STATES DISTRICT JUDGE

ATTEST: A TRUE COPY

DATE August 21, 1990
ROBERT H. SHEMWELL,
CLERK

By Sandra J. Dean
Deputy Clerk, U. S. District Court
Western District of Louisiana

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NASCO, INC.	:	CIVIL ACTION
-vs-	:	NO. 83-2564
CALCASIEU TELEVISION AND RADIO, INC. ET AL	:	JUDGE SCOTT

RULING

(Filed Sept. 27, 1990)

Before the court for consideration is the Motion of defendant Richard A. Curry (Curry) for an *en banc* reconsideration of our judgment against him dated August 18, 1990 and entered on August 21, 1990 or alternatively for appeal of that judgment to the active judges of this court. Although the caption of the motion and the notice of appeal designates the undersigned as the trial judge, the notice of appeal is directed solely and specifically to the active judges of this court. The attorney's certificate certifies that a copy of the motion, the memorandum in support thereof, and the notice of appeal to the active judges and a courtesy copy to each of the senior judges of this court including the undersigned as well as the attorneys of record.

This proceeding was filed on October 17, 1983. On August 6, 1986, the United States Court of Appeals for the Fifth Circuit, at the close of oral argument, ruled from the bench, *per curiam*, affirming this court's judgment on

the merits, declaring the defendants' appeals to be frivolous, imposing appellate sanctions against Chambers and Curry's client, Baker, pursuant to Fed. R. App. P. 38 in the form of attorney's fees and double costs and remanded the case with instructions to the trial court to fix the amount of appellate sanctions and to determine whether further sanctions should be imposed against the defendants and/or their counsel for the manner in which the litigation was conducted in the district court. The trial court issued its opinion and its judgment on sanctions on January 23, 1989. The sanction judgment was affirmed February 6, 1990. Curry's petition for rehearing was denied on May 4, 1990 as follows:

PER CURIAM:

> The petitions for rehearing en banc are denied, *no active member of the court having requested a poll.* The petitions for panel rehearing are denied except upon further consideration of Richard A. Curry's petition for panel rehearing, we remand the case, as to Curry only, to the district court for reconsideration.
>
> Curry vehemently denies that his conduct subjected him to suspension under the court's inherent powers; he protests that he did little more than sign pleadings. He insists that he did not receive an adequate opportunity to defend himself. We are persuaded that we should remand the case as to Curry only. On remand the district court will allow Curry to offer any relevant argument and evidence he may have. The district court may then reinstate, supplement or change its present findings and any ordered sanctions as it finds appropriate.

> *We do not hold that the imposed sanction was an inappropriate response to the district court's perception of Curry's role. Curry seeks a further opportunity to dispel that perception. We do no more than allow him to do so perhaps out of an excess of caution.*

The undersigned trial judge held an evidentiary hearing as directed by the remand on July 6, 1990 and we issued our judgment on August 18, 1990. This judgment is the object of Curry's motion. This suit was filed on October 17, 1983, almost seven years ago. The appeals court inaugurated this sanction phase on August 6, 1986, more than four years ago. It is time that these proceedings end.

Although Curry has directed this motion to the active judges of this court, there is no legal basis for their consideration of the motion, the appeals court's remand having been directed specifically and solely to the undersigned trial judge, it is proper for the undersigned to consider and rule upon the motion. We proceed to do so.

Shortly after our sanctions judgment of January 23, 1989 and before any of the three attorney defendants filed their notices of appeal, we, in our ruling dated February 15, 1989, denied their motions that we submit the sanctions found by us to a panel of the active judges of this court. That judgment was not appealed, consequently it is a final judgment.

Our sanctions judgment has been appealed and affirmed and petitions for rehearing denied, "no active member of the court having requested a poll." The last five lines of the remand make it very clear that the remand would not have the effect of disturbing the finality of the sanctions found in our judgment of January 23,

1989. This remand in the appellate court's denial of Curry's plea for rehearing did not disturb the finality of the sanctions judgment any more than the sanctions remand of the same court disturb the finality of our judgment on the merits. That judgment is final.

Curry bases his motion on a preliminary draft of a local rule which is subject to review and revision and which may never be adopted. We quote the pertinent section 20.10bW:

> 20.10W Attorney Discipline.
>
> . . .
>
> b. Any judge of this Court may, pursuant to its inherent powers, the Federal Rules or the United States Code, fine or suspend for a period not to exceed ninety (90) days, for good cause shown, any member of the bar of this Court without regard to any of the formalities set forth in this rule. Any appeal from such action must first be presented to the active judges of this Court.

Curry had every chance to implement this paragraph when the undersigned trial judge issued the sanctions judgment on January 23, 1989. He failed to do so. Instead he and two other attorney defendants filed motions that the sanctions in this proceeding be handled by a panel consisting of the active judges in the Western District of Louisiana. In our ruling of February 15, 1989 we denied the motions stating that the suggestion was certainly novel since we had already issued our sanctions judgment as directed by the remand from the United States Court of Appeals for the Fifth Circuit. We stated further that the referral of sanctions to a de facto Court of

Appeals at the trial level, consisting of the active judges of this district, was inappropriate and without basis in law. As we have pointed out previously, the movers did not appeal and that judgment is now final.

In his petition for a rehearing *en banc* Curry vehemently denied that his conduct in this case subjected him to suspension under the court's inherent powers, protested that he did little more than sign pleadings and insisted that he did not receive an adequate opportunity to defend himself. Mindful of the allegations, the appellate court remanded for the purpose of allowing Curry an evidentiary hearing, perhaps, as they said, out of an excess of caution. Curry attended that hearing and presented evidence, none of which had the least effect on the trial court's perception as reflected in the record. Thereafter we issued our judgment of August 21, 1990. Up to this time the appeal had progressed in the usual manner.

Now we are faced by a motion that the August 21, 1990 sanction imposed on Curry be reviewed by the active judges of the district court *en banc* on reconsideration or appeal. A cursory examination of our August 21, 1990 judgment will disclose that it contained no sanctions so there is nothing in that judgment for the active judges of this court to review. The only sanctions imposed by this court are those contained in our judgment of January 23, 1989. The trial court did not proffer this judgment to the Court of Appeals. The Court of Appeals did not seek any review of the judgment. It was Curry and Curry alone, who sought review by the Court of Appeals. The Court of Appeals through its ordinary course of business has now affirmed the sanctions judgment and has denied rehearing. What Curry, on the basis of a preliminary draft

of a proposed local rule which may never be adopted, is really asking the active judges to review by consideration or appeal is the now final judgment of the Court of Appeals. Unbelievable. The Motion is **DENIED.**

DONE AND SIGNED at Alexandria, Louisiana, this 27th day of September, 1990.

/s/ Norman S. Scott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NASCO, INC.	:	CIVIL ACTION
-vs-	:	NO. 83-2564
CALCASIEU TELEVISION AND RADIO, INC. ET AL	:	JUDGE SCOTT

ORDER

(Filed Sept. 27, 1990)

For written reasons this day assigned:

LET the motion of Richard A. Curry dated September 5, 1990 be and it is hereby DENIED; and

LET the "Notice of Appeal" filed by the mover be vacated.

Alexandria, Louisiana, this 27th day of September, 1990.

/s/ Norman S. Scott
UNITED STATES DISTRICT JUDGE

G. Russell CHAMBERS, Petitioner,

v.

NASCO, INC.*

No. 90-256.

Argued Fed. 27, 1991.

Decided June 6, 1991

WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion. KENNEDY, J., filed a dissenting opinion in which REHNQUIST, C.J., and SOURTER, J., joined.

Mack E. Barham, New Orleans, La., for petitioner.

Joel I. Klein, Washington, D.C., for respondent.

Justice WHITE delivered the opinion of the Court.

This case requires us to explore the scope of the inherent power of a federal court to sanction a litigant for bad-faith conduct. Specifically, we are asked to determine whether the District Court, sitting in diversity, properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorney's fees and related expenses paid by the party's opponent to its attorneys. We hold that the District Court acted within its discretion, and we therefore affirm the judgment of the Court of Appeals.

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* As the case appears in the Supreme Court Reporter at 111 S.Ct 2123 (1991).

I

This case began as a simple action for specific performance of a contract, but it did not remain so.[1] Petitioner G. Russell Chambers was the sole shareholder and director of Calcasieu Television and Radio, Inc. (CTR), which operated television station KPLC-TV in Lake Charles, Louisiana. On August 9, 1983, Chambers, acting both in his individual capacity and on behalf of CTR, entered into a purchase agreement to sell the station's facilities and broadcast license to respondent NASCO, Inc., for a purchase price of $18 million. The agreement was not recorded in the parishes in which the two properties housing the station's facilities were located. Consummation of the agreement was subject to the approval of the Federal Communications Commission (FCC); both parties were obligated to file the necessary documents with the FCC no later than September 23, 1983. By late August, however, Chambers had changed his mind and tried to talk NASCO out of consummating the sale. NASCO refused. On September 23, Chambers, through counsel, informed NASCO that he would not file the necessary papers with the FCC.

NASCO decided to take legal action. On Friday, October 14, 1983, NASCO's counsel informed counsel for Chambers and CTR that NASCO would file suit the following Monday in the United States District Court for the

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[1] The facts recited here are taken from the findings of the District Court, which were not disturbed by the Court of Appeals.

Western District of Louisiana, seeking specific performance of the agreement, as well as a temporary restraining order (TRO) to prevent the alienation or encumbrance of the properties at issue. NASCO provided this notice in accordance with Federal Rule of Civil Procedure 65 and Rule 11 of the District Court's Local Rules (now Rule 10), both of which are designed to give a defendant in a TRO application notice of the hearing and an opportunity to be heard.

The reaction of Chambers and his attorney, A.J. Gray III, was later described by the District Court as having "emasculated and frustrated the purposes of these rules and the powers of [the District] Court by utilizing this notice to prevent NASCO's access to the remedy of specific performance." *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 623 F.Supp. 1372, 1383 (WD La.1985). On Sunday, October 16, 1983, the pair acted to place the properties at issue beyond the reach of the District Court by means of the Louisiana Public Records Doctrine. Because the purchase agreement had never been recorded, they determined that if the properties were sold to a third party, and if the deeds were recorded before the issuance of a TRO, the District Court would lack jurisdiction over the properties.

To this end, Chambers and Gray created a trust, with Chambers' sister as trustee and Chambers' three adult children as beneficiaries. The pair then directed the president of CTR, who later became Chambers' wife, to execute warranty deeds conveying the two tracts at issue to the trust for a recited consideration of $1.4 million. Early Monday morning, the deeds were recorded. The trustee, as purchaser, had not signed the deeds; none of the

consideration had been paid; and CTR remained in possession of the properties. Later that morning, NASCO's counsel appeared in the District Court to file the complaint and seek the TRO. With NASCO's counsel present, the District Judge telephoned Gray. Despite the judge's queries concerning the possibility that CTR was negotiating to sell the properties to a third person, Gray made no mention of the recordation of the deeds earlier that morning. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120, 126, n. 8 (WD La. 1989). That afternoon, Chambers met with his sister and had her sign the trust documents and a $1.4 million note to CTR. The next morning, Gray informed the District Court by letter of the recordation of the deeds the day before, and admitted that he had intentionally withheld the information from the court.

Within the next few days, Chambers' attorneys prepared a leaseback agreement from the trustee to CTR, so that CTR could remain in possession of the properties and continue to operate the station. The following week, the District Court granted a preliminary injunction against Chambers and CTR and entered a second TRO to prevent the trustee from alienating or encumbering the properties. At that hearing, the District Judge warned that Gray's and Chambers' conduct had been unethical.

Despite this early warning, Chambers, often acting through his attorneys, continued to abuse the judicial process. In November, 1983, in defiance of the preliminary injunction, he refused to allow NASCO to inspect CTR's corporate records. The ensuing civil contempt proceedings resulted in the assessment of a $25,000 fine against Chambers personally. *NASCO, Inc. v. Calcasieu*

Television & Radio, Inc., 583 F.Supp. 115 (WD La.1984). Two subsequent appeals from the contempt order were dismissed for lack of a final judgment. See *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, No. 84-9037 (CA5, May 19, 1984); *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 752 F.2d 157 (CA5 1985).

Undeterred, Chambers proceeded with "a series of meritless motions and pleadings and delaying actions." 124 F.R.D., at 127. These actions triggered further warnings from the court. At one point, acting *sua sponte*, the District Judge called a status conference to find out why bankers were being deposed. When informed by Chambers' counsel that the purpose was to learn whether NASCO could afford to pay for the station, the court canceled the depositions consistent with its authority under Federal Rule of Civil Procedure 26(g).

At the status conference nine days before the April 1985 trial date,[2] the District Judge again warned counsel that further misconduct would not be tolerated.[3] Finally, on the eve of trial, Chambers and CTR stipulated that the purchase agreement was enforceable and that Chambers had breached the agreement on September 23, 1983, by

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[2] The trial date itself reflected delaying tactics. Trial had been set for February 1985, but in January, Gray, on behalf of Chambers, filed a motion to recuse the judge. The motion was denied, as was the subsequent writ of mandamus filed in the Court of Appeals.

[3] To make his point clear, the District Judge gave counsel copies of Judge Schwarzer's then-recent article, Sanctions Under the New Federal Rule II – A Closer Look, 104 F.D.R. 181 (1985).

failing to file the necessary papers with the FCC. At trial, the only defense presented by Chambers was the Public Records Doctrine.

In the interlude between the trial and the entry of judgment during which the District Court prepared its opinion. Chambers sought to render the purchase agreement meaningless by seeking permission from the FCC to build a new transmission tower for the station and to relocate the transmission facilities to that site, which was not covered by the agreement. Only after NASCO sought contempt sanctions did Chambers withdraw the application.

The District Court entered judgment on the merits in NASCO's favor, finding that the transfer of the properties to the trust was a simulated sale and that the deeds purporting to convey the property were "null, void and of no effect." 623 F.Supp., at 1385. Chambers' motions, filed in the District Court, the Court of Appeals, and this Court to stay the judgment pending appeal were denied. Undeterred, Chambers convinced CTR officials to file formal oppositions to NASCO's pending application for FCC approval of the transfer of the station's license, in contravention of both the District Court's injunctive orders and its judgment on the merits. NASCO then sought contempt sanctions for a third time, and the oppositions were withdrawn.

When Chambers refused to prepare to close the sale, NASCO again sought the court's help. A hearing was set for July 16, 1986, to determine whether certain equipment was to be included in the sale. At the beginning of the hearing, the court informed Chambers' new attorney.

Edwin A. McCabe,[4] that further sanctionable conduct would not be tolerated. When the hearing was recessed for several days, Chambers, without notice to the court or NASCO, removed from service at the station all of the equipment at issue, forcing the District Court to order that equipment be returned to service.

Immediately following oral argument on Chambers' appeal from the District Court's judgment on the merits, the Court of Appeals, ruling from the bench, found the appeal frivolous. The Court imposed appellate sanctions in the form of attorney's fees and double costs, pursuant to Federal Rule of Appellate Procedure 38, and remanded the case to the District Court with orders to fix the amount of appellate sanctions and to determine whether further sanctions should be imposed for the manner in which the litigation had been conducted. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 797 F.2d 975 (CA5, 1986) (*per curiam*) (unpublished order).

On remand, NASCO moved for sanctions, invoking the District Court's inherent power, Fed.Rule Civ.Proc. 11, and 28 U.S.C. § 1927. After full briefing and a hearing, see 124 F.R.D., at 141 n. 11, the District Court determined that sanctions were appropriate "for the manner in which this proceeding was conducted in the district court from October 14, 1983, the time that plaintiff gave notice of its intention to file suit to this date." *Id.*, at 123. At the end of an extensive opinion recounting what it deemed to have been sanctionable conduct during this period, the court

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[4] Gray had resigned as counsel for Chambers and CTR several months previously.

imposed sanctions against Chambers in the form of attorney's fees and expenses totaling $996,644.65, which represented the entire amount of NASCO's litigation costs paid to its attorneys.[5] In so doing, the court rejected Chambers' argument that he had merely followed the advise of counsel, labeling him "the strategist," *id.*, at 132, behind a scheme devised "first, to deprive this Court of jurisdiction and, second, to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance," *id.*, at 136.

In imposing the sanctions the District Court first considered Federal Rule of Civil Procedure 11. It noted that the alleged sanctionable conduct was that Chambers and other defendants had "(1) attempted to deprive this

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[5] In calculating the award, the District Court deducted the amounts previously awarded as compensatory damages for contempt, as well as the amount awarded as appellate sanctions. 124 F.R.D., at 133-134.

The court also sanctioned other individuals who are not parties to the action in this Court. Chambers' sister, the trustee, was sanctioned by a reprimand; attorney Gray was disbarred and prohibited from seeking readmission for three years; attorney Richard A. Curry, who represented the trustee, was suspended from practice before the court for six months; and attorney McCabe was suspended for five years. *Id.*, at 144-146. Although these sanctions did not affect the bank accounts of these individuals, they were nevertheless substantial sanctions and were as proportionate to the conduct at issue as was the monetary sanction imposed on Chambers. Indeed, in the case of the disbarment of attorney Gray, the court recognized that the penalty was among the harshest possible sanctions and one which derived from its authority to supervise those admitted to practice before it. See *id.* at 140-141.

Court of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of this Court, (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance." *Id.*, at 138. The court recognized that the conduct in the first and third categories could not be reached by Rule 11, which governs only papers filed with a court. As for the second category, the court explained that the falsity of the pleadings at issue did not become apparent until after the trial on the merits, so that it would have been impossible to assess sanctions at the time the papers were filed. *Id.*, at 138-139. Consequently, the District Court Deemed Rule 11 "insufficient" for its purpose. *Id.*, at 139. The court likewise declined to impose sanctions under § 1927,[6] both because the statute applies only to attorney's and therefore would not reach Chambers, and because the statute was not broad enough to reach "acts which degrade the judicial system," including "attempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court." *Ibid.* The Court therefore relied on its inherent power in imposing sanctions, stressing that "[t]he wielding of that inherent power is particularly appropriate when the offending parties have practiced a fraud upon the court." *Ibid.*

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[6] That statute provides:

"Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

The Court of Appeals affirmed. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696 (CA5 1990). The Court rejected Chambers' argument that a federal court sitting in diversity must look to state law, not the court's inherent power, to assess attorney's fees as a sanction for bad-faith conduct in litigation. The court further found that neither 28 U.S.C. § 1927 nor Federal Rule of Civil Procedure 11 limits a court's inherent authority to sanction bad-faith conduct "when the party's conduct is not within the reach of the rule or the statute."[7] 894 F.2d, at 702-703. Although observing that the inherent power "is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function," *id.*, at 702, the court also concluded that the District Court did not abuse its discretion in awarding to NASCO the fees and litigation costs paid to its attorneys. Because of the importance of these issues, we granted certiorari, 498 U.S. ___, 111 S.Ct. 38, 112 L.Ed.2d 15 (1990).

II

Chambers maintains that 28 U.S.C. § 1927 and the various sanctioning provisions in the Federal Rules of Civil Procedure[8] reflects a legislative intent to displace

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[7] The court remanded for a reconsideration of the proper sanction for attorney McCabe. 894 F.2d, at 708.

[8] A number of the rules provide for the imposition of attorney's fees as a sanction. See Fed.Rule Civ.Proc. 11 (certification requirement for papers), 16(f) (pretrial conferences), 26(g) (certification requirement for discovery requests), 30(g)

(Continued on following page)

the inherent power. At least, he argues that they obviate or foreclose resort to the inherent power in this case. We agree with the Court of Appeals that neither proposition is persuasive.

A

It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (citing *Hudson*). For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821); see also *Ex parte Robinson*, 19 Wall. 505, 510, 22 L.Ed. 205 (1874). These

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(oral depositions), 37 (sanctions for failure to cooperate with discovery), 56(g) (affidavits). In some instances, the assessment of fees is one of a range of possible sanctions, *see, e.g.*, Fed.Rule Civ.Proc. 11, while in others, the court must award fees, see, *e.g.*, Fed.Rule Civ.Proc. 16(f). In each case, the fees that may be assessed are limited to those incurred as a result of the rule violation. In the case of Rule 11, however, a violation could conceivably warrant an imposition of fees covering the entire litigation, if, for example a complaint or answer was filed in violation of the rule. The court generally may act *sua sponte* in imposing sanctions under the rules.

powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 82 S.Ct. 1386, 1388-1389, 8 L.Ed.2d 734 (1962).

Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it. See *Ex parte Burr*, 9 Wheat. 529, 531, 6 L.Ed. 152 (1824). While this power "ought to be exercised with great caution," it is nevertheless "incidental to all Courts". *Ibid.*

In addition, it is firmly established that "[t]he power to punish for contempts is inherent in all courts." *Robinson, supra*, at 510. This power reaches both conduct before the court and that beyond the court's confines, for "[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial." *Young v. United States ex rel. Vuitton et Fils* S.A., 481 U.S. 787, 798, 107 S.Ct. 2124, 2132, 95 L.Ed.2d 740 (1987) (citations omitted).

Of particular relevance here, the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447 (1946) This "historic power of

equity to set aside fraudulently begotten judgments." *Hazel-Atlas*, 322 U.S., at 245, 64 S.Ct., at 1001, is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." *Id.*, at 246, 64 S.Ct., at 1001. Moreover, a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud. *Universal Oil, supra*, 328 U.S., at 580, 66 S.Ct., at 1179.

There are other facets to a federal court's inherent power. The court may bar from the courtroom a criminal defendant who disrupts a trial. *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). It may dismiss an action on grounds of *forum non conveniens*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-508, 67 S.Ct. 839, 842-843, 91 L.Ed. 1055 (1947); and it may act *sua sponte* to dismiss a suit for failure to prosecute, *Link, supra*, 370 U.S., at 630-631, 82 S.Ct. at 1388-1389.

Because of their very potency, inherent powers must be exercised with restraint and discretion. See *Roadway Express, supra*, 447 U.S., at 764, 100 S.Ct., at 2463. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. As we recognized in *Roadway Express*, outright dismissal of a lawsuit, which we had upheld in *Link*, is a particularly severe sanction, yet is within the court's discretion. 447 U.S. at 765, 100 S.Ct., at 2463. Consequently, the "less severe sanction" of an assessment of attorney's fees is undoubtedly within a court's inherent power as well. *Ibid.* See also *Hutto v. Finney*, 437 U.S.

678, 689, n. 14, 98 S.Ct. 2565, 2573, n. 14, 57 L.Ed.2d 522 (1978).

Indeed, "[t]here are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel," *Roadway Express, supra,* 447 U.S., at 765, 100 S.Ct., at 2463, even though the so-called "American Rule" prohibits fee-shifting in most cases. See *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 259, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975). As we explained in *Alyeska,* these exceptions fall into three categories.[9] The first, known as the "common fund exception," derives not from a court's power to control litigants, but from its historic equity jurisdiction, see *Sprague v. Ticonic National Bank,* 307 U.S. 161, 164, 59 S.Ct. 777, 778, 83 L.Ed. 1184 (1939), and allows a court to award attorney's fees to a party whose litigation efforts directly benefit others. *Alyeska,* 421 U.S. at 257-258, 95 S.Ct., at 1621-1622. Second, a court may assess attorney's fees as a sanction for the " 'willful disobedience of a court order.' " *Id.,* at 258, 95 S.Ct., at 1622 (quoting *Fleishmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)). Thus, a court's discretion to determine "[t]he degree of punishment for contempt"

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[9] See also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 561-562, and n. 6, 106 S.Ct. 3088, 3096-3097, and n. 6, 92 L.Ed.2d 439 (1986); *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters & Joiners of America,* 456 U.S. 717, 721, 102 S.Ct. 2112, 2114, 72 L.Ed.2d 511 (1982); *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.,* 417 U.S. 116, 129-130, 94 S.Ct. 2157, 2165-2166, 40 L.Ed.2d 703 (1974).

permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428, 43 S.Ct. 458, 466, 67 L.Ed. 719 (1923).

Third, and most relevant here, a court may assess attorney's fees when a party has " 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Alyeska, supra*, 421 U.S. at 258-259, 95 S.Ct., at 1622-1623 (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct., 2157, 2165, 40 L.Ed.2d 703 (1974)). See also *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 4, 88 S.Ct. 964, 966, n. 4, 19 L.Ed.2d 1263 (1968) (*per curiam*). In this regard, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," it may assess attorney's fees against the responsible party, *Universal Oil, supra*, 328 U.S., at 580, 66 S.Ct., at 1179, as it may when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order,"[10] *Hutto*, 437 U.S. at 689, n. 14, 98 S.Ct., at 2573, n. 14. The imposition of sanctions in the instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicat[ing] judicial authority without

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[10] In this regard, the bad-faith exception resembles the third prong of Rule 11's certification requirement, which mandates that a signer of a paper filed with the court warrant that the paper "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation."

resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Ibid.*

B

We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices. Even the dissent so concedes. See *post*, at 2143. Second, while the narrow exceptions to the American Rule effectively limit a court's inherent power to impose attorney's fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders, many of the other mechanisms permit a court to impose attorney's fees as a sanction for conduct which merely fails to meet a reasonableness standard. Rule 11, for example, imposes an objective standard of reasonable inquiry which does not mandate a finding of bad faith.[11]

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[11] Indeed, Rule 11 was amended in 1983 precisely because the subjective bad-faith standard was difficult to establish and courts were therefore reluctant to invoke it as a means of imposing sanctions. See Advisory Committee Notes on the 1983 Amendment to Rule 11, 28 U.S.C. App., pp. 575-576.

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See *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. ___, ___, 111 S.Ct. 922, 932, 112 L.Ed.2d 1140 (1991).

It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, for "[t]hese courts were created by act of Congress." *Robinson*, 19 Wall., at 511. Nevertheless, "we do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982); see also *Link*, 370 U.S., at 631-632, 82 S.Ct., at 1389-1390. In *Alyeska* we determined that "Congress ha[d] not repudiated the judicially fashioned exceptions" to the American Rule, which were founded in the inherent power of the courts. 421 U.S., at 260, 95 S.Ct., at 1623. Nothing since then has changed that assessment,[12] and we have thus reaffirmed

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Consequently, there is little risk that courts will invoke their inherent power "to chill the advocacy of litigants attempting to vindicate all other important federal rights." See *post*, at 2145. To the extent that such a risk does exist, it is no less present when a court invokes Rule 11. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, ___, 110 S.Ct. 2447, ___, 110 L.Ed.2d 359 (1990).

[12] Chambers also asserts that all inherent powers are not created equal. Relying on *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562-563 (CA3 1986) (en banc), he suggests that inherent powers fall into three tiers: (1) irreducible powers derived from Article III, which exist despite contrary legislative direction; (2) essential powers that arise from the nature of the court, which can be legislatively regulated but not abrogated; and (3) powers that are necessary only in the sense of being

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the scope and the existence of the exceptions since the most recent amendments to § 1927 and Rule 11, the other sanctioning mechanisms invoked by NASCO here. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561-562, and n. 6, 106 S.Ct. 3088, 3096-3097, and n. 6, 92 L.Ed.2d 439 (1986). As the Court of Appeals recognized, 894 F.2d at 702, the amendment to § 1927 allowing an assessment of fees against an attorney says nothing about a court's power to assess fees against a party. Likewise, the Advisory Committee Notes on the 1983 Amendment to Rule 11, 28 U.S.C.App., p. 575, declare that the Rule "build[s] upon and expand[s] the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation," citing as support this Court's decisions in *Roadway Express* and *Hall*.[13] Thus, as the Court of Appeals

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useful, which exist absent legislation to the contrary. Brief for Petitioner 17. Chambers acknowledges that this Court has never so classified the inherent powers, and we have no need to do so now. Even assuming, *arguendo*, that the power to shift fees falls into the bottom tier of this alleged hierarchy of inherent powers, Chambers' argument is unavailing, because we find no legislature intent to limit the scope of this power.

[13] The Advisory Committee Notes to the 1983 Amendments to other rules reflect a similar intent to preserve the scope of the inherent power. While the Notes to Rule 16, 28 U.S.C. App., p. 591, point out that the sanctioning provisions are designed "to obviate dependence upon Rule 41(b) or the court's inherent power," there is no indication of an intent to displace the inherent power, but rather simply to provide courts with an additional tool by which to control the judicial process. The Notes to Rule 26(g), 28 U.S.C.App., p. 622, point

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for the Ninth Circuit has recognized, Rule 11 "does not repeal or modify existing authority of federal courts to deal with abuses . . . under the court's inherent power." *Zaldivar v. Los Angeles*, 780 F.2d 823, 830 (CA9 1986).

The Court's prior cases have indicated that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct. In *Link*, it was recognized that a federal district court has the inherent power to dismiss a case *sua sponte* for failure to prosecute, even though the language of Federal Rule of Civil Procedure 41(b) appeared to require a motion from a party:

> "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even from language in this Court's opinion in *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176 [3 S.Ct. 570, 571, 28 L.Ed. 109 (1884)]. It also has the sanction of wide usage among the District Courts. It would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition." 370 U.S., at

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out that the rule "makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power." (Citations omitted).

630-632, 82 S.Ct., at 1388-1390 (footnotes omitted).

In *Roadway Express*, a party failed to comply with discovery orders and a court order concerning the schedule for filing briefs. 447 U.S., at 755, 100 S.Ct. at 2458. After determining that § 1927, as it then existed, would not allow for the assessment of attorney's fees, we remanded the case for a consideration of sanctions under *both* Federal Rule of Civil Procedure 37 *and* the court's inherent power, while recognizing that invocation of the inherent power would require a finding of bad faith.[14] *Id.* at 767, 100 S.Ct. at 2464.

There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is

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[14] The decision in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), is not to the contrary. There it was held that the Court of Appeals had erred in relying on the District Court's inherent power and Rule 41(b), rather than Federal Rule of Civil Procedure 37(b)(2)(iii), in dismissing a complaint for a plaintiff's failure to comply with a discovery order. Because Rule 37 dealt specifically with discovery sanctions, *id.*, at 207, 78 S.Ct., at 1093, there was "no need" to resort to Rule 41(b), which pertains to trials, or to the court's inherent power. *Ibid.* Moreover, because individual rules address specific problems, in many instances it might be improper to invoke one when another directly applies. Cf. *Zaldivar v. Los Angeles*, 780 F.2d 823, 830 (CA9 1986).

a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, see *Roadway Express, supra,* at 767, 100 S.Ct., at 2464. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court ordinarily should rely on the rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the rules are up to the task, the court may safely rely on its inherent power.

Like the Court of Appeals, we find no abuse of discretion in resorting to the inherent power in the circumstances of this case. It is true that the District Court could have employed Rule 11 to sanction Chambers for filing "false and frivolous pleadings," 124 F.R.D., at 138, and that some of the other conduct might have been reached through other rules. Much of the bad-faith conduct by Chambers, however, was beyond the reach of the rules, his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the rules was intertwined within conduct that only the inherent power could address. In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to

foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves. See, *e.g.*, Advisory Committee Notes on the 1983 Amendment to Rule 11, 28 U.S.C.App., pp. 575-576.

We likewise do not find that the District Court's reliance on the inherent power thwarted the purposes of the other sanctioning mechanisms. Although the dissent makes much of the fact that Rule 11 and Rule 26(g) "are cast in mandatory terms," *post*, at 2144, the mandate of these provisions extends only to *whether* a court must impose sanctions, not to *which* sanction it must impose. Indeed, the language of both rules requires only that a court impose "an appropriate sanction." Thus, this case is distinguishable from *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), in which this Court held that a district court could not rely on its supervisory power as a means of circumventing the clear mandate of a procedural rule. *Id.* at 254-25, 108 S.Ct., at 2373-2374.

III

Chambers asserts that even if federal courts can use their inherent power to assess attorney's fees as a sanction in some cases, they are not free to do so when they sit in diversity, unless the applicable state law recognizes the "bad-faith" exception to the general rule against fee shifting. He relies on footnote 31 in *Alyeska*, in which we stated with regard to the exceptions to the American Rule that "[a] very different situation is presented when a federal court sits in a diversity case. '[I]n an ordinary diversity case where the state law does not run counter to

a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.' 6 J. Moore, Federal Practice ¶ 54.77[2], pp. 1712-1713 (2d ed. 1974) (footnotes omitted)." 421 U.S., at 259, n. 31, 95 S.Ct., at 1622, n. 31.

We agree with NASCO that Chambers has misinterpreted footnote 31. The limitation on a court's inherent power described there applies only to fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees. That was precisely the issue in *People of Sioux County v. National Surety Co.*, 276 U.S. 238, 48 S.Ct. 239, 72 L.Ed. 547 (1928), the only case cited in footnote 31. There, a state statute mandated that in actions to enforce an insurance policy, the court was to award the plaintiff a reasonable attorney's fee. See *id.*, at 424, 48 S.Ct., at 240, and n. 2. In enforcing the statute, the Court treated the provision as part of a statutory liability which created a substantive right. *Id.*, at 241-242, 48 S.Ct., at 240. Indeed, *Alyeska* itself concerned the substantive nature of the public policy choices involved in deciding whether vindication of the rights afforded by a particular statute is important enough to warrant the award of fees. See 421 U.S., at 260-263, 95 S.Ct. at 1623-1625.

Only when there is a conflict between state and federal substantive law are the concerns of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), at issue. As we explained in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), the "outcome determinative" test of *Erie* and *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), "cannot be

read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U.S., at 468, 85 S.Ct. at 1142. Despite Chambers' protestations to the contrary, neither of these twin aims is implicated by the assessment of attorney's fees as a sanction for bad-faith conduct before the court which involved disobedience of the court's orders and the attempt to defraud the court itself. In our recent decision in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S., at ___, 111 S.Ct., at 934, we stated, "Rule 11 sanctions do not constitute the kind of fee shifting at issue in *Alyeska* [because they] are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well founded." Likewise, the imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation. Consequently, there is no risk that the exception will lead to forum-shopping. Nor is it inequitable to apply the exception to citizens and noncitizens alike, when the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed. As the Court of Appeals expressed it, "*Erie* guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court. It does not allow him to waste the court's time and resources with cantankerous conduct, even in the unlikely event a state court would allow him to do so." 894 F.2d, at 706.

As Chambers has recognized, see Brief for Petitioner 15, in the case of the bad-faith exception to the American Rule, "the underlying rationale of 'fee shifting' is, of course, punitive." *Hall*, 412 U.S., at 4-5, 93 S.Ct. at 1945-1946. Cf. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126, 110 S.Ct. 456, ___, 107 L.Ed.2d 438 (1989)."[T]he award of attorney's fees for bad faith serve[s] the same purpose as a remedial fine imposed for civil contempt," because "[i]t vindicate[s] the District Court's authority over a recalcitrant litigant." *Hutto*, 437 U.S. at 691, 98 S.Ct., at 2574. "That the award ha[s] a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience."[15] *Id.*, at 691, n. 17, 98 S.Ct., at 2974, n. 17.

Chambers argues that because the primary purpose of the sanction is punitive, assessing attorney's fees violates the State's prohibition on punitive damages. Under Louisiana law, there can be no punitive damages for breach of contract, even when a party has acted in bad faith in breaching the agreement. *Lancaster v. Petroleum Corp. of Delaware*, 491 So.2d 768, 779 (La.App.1986). Cf. La.Civ.Code Ann., Art. 1995 (West 1987). Indeed, "as a general rule attorney's fees are not allowed a successful litigant in Louisiana except where authorized by statute or by contract." *Rutherford v. Impson*, 366 So.2d 944, 947 (La.App. 1978). It is clear, though, that this general rule

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[15] Consequently, Chambers' reformulated argument in his reply brief that the primary purpose of a fee shift under the bad-faith exception "has always been compensatory," Reply for Petitioner 15-16, fails utterly.

focuses on the award of attorney's fees because of a party's success on the underlying claim. Thus, in *Frank L. Beier Radio, Inc. v. Black Gold Marine, Inc.*, 449 So.2d 1014 (La.1984), the state court considered the scope of statute which permitted an award of attorney's fees in a suit seeking to collect on an open account. *Id.*, at 1015. This substantive state policy is not implicated here, where sanctions were imposed for conduct during the litigation.

Here the District Court did not attempt to sanction petitioner for breach of contract,[16] but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation.[17] See 124

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[16] We therefore express no opinion as to whether the District Court would have had the inherent power to sanction Chambers for conduct relating to the underlying breach of contract, or whether such sanctions might implicate the concerns of *Erie*.

[17] Contrary to Chambers' assertion, the District Court did not sanction him for failing to file the requisite papers with the FCC in September 1983, although the District Court did find that this conduct was a deliberate violation of the agreement and was done "in absolute bad faith," 124 F.R.D., at 125. As the court noted, "the allegedly sanctionable acts were committed in the conduct and trial of the very proceeding in which sanctions [were] sought," *id.*, at 141, n. 11, and thus the sanctions imposed "appl[ied] only to sanctionable acts which occurred in connection with the proceedings in the trial Court," *id.*, at 143. Although the fraudulent transfer of assets took place before the suit was filed, it occurred after Chambers was given notice, pursuant to court rule, of the pending suit. Consequently, the sanctions imposed on Chambers were aimed at punishing not only the harm done to NASCO, but also the harm done to the court itself. Indeed, the District Court made

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F.R.D., as 123, 143. We agree with the Court of Appeals that "[w]e do not see how the district court's inherent power to tax fees for that conduct can be made subservient to any state policy without transgressing the boundaries set out in *Erie, Guaranty Trust Co.*, and *Hanna*," for "[f]ee-shifting here is not a matter of substantive remedy, but of vindicating judicial authority." 894 F.2d, at 705.

IV

We review a court's imposition of sanctions under its inherent power for abuse of discretion. *Link*, 370 U.S., at 633, 82 S.Ct., at 1390; see also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, ___, 110 S.Ct. 2447, 2460-2461, 110 L.Ed.2d 359 (1990) (Rule 11). Based on the circumstances of this case, we find that the District Court acted within its discretion in assessing as a sanction for Chambers' bad-faith conduct the entire amount of NASCO's attorney's fees.

Relying on cases imposing sanctions under Rule 11,[18] Chambers proffers five criteria for imposing attorney's

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clear that it was policing abuse of its own process when it imposed sanctions "for the manner in which this proceeding was conducted in the district court from October 14, 1983, the time that plaintiff gave notice of its intention to file suit." *Id.*, at 123.

[18] See, *e.g.*, *In re Kunstler*, 914 F.2d 505 (CA4 1990), cert. denied, 449 U.S. ___, 111 S.Ct. 1607, 113 L.Ed.2d 669 (1991); *White v. General Motors Corp., Inc.*, 908 F.2d 675 (CA10 1990); *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (CA5 1988) (en banc).

fees as a sanction under a court's inherent power, and argues that the District Court acted improperly with regard to each of them. First, he asserts that sanctions must be timely in order to have the desired deterrent affect, and that the post-judgment sanction imposed here fails to achieve that aim. As NASCO points out, however, we have made clear that, even under Rule 11, sanctions may be imposed years after a judgment on the merits.[19] *Id.*, at ___, 110 S.Ct., at 2455-2456. Interrupting the proceedings on the merits to conduct sanctions hearings may serve only to reward a party seeking delay. More importantly, while the sanction was not assessed until the conclusion of the litigation, Chambers received repeated timely warnings both from NASCO and the court that his conduct was sanctionable. Cf. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 879-881 (CA5 1988) (en banc). Consequently, the District Court's reliance on the inherent power did not represent an end run around the notice requirements of Rule 11. The fact that Chambers obstinately refused to be deterred does not render the District Court's action and abuse of discretion.

Second, Chambers claims that the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular wrong.

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[19] Cf. Advisory Committee Notes on the 1983 Amendment to Rule 11, 28 U.S.C.App., p. 576 ("The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter").

As NASCO points out, however, the District Court concluded that full attorney's fees were warranted due to the frequency and severity of Chambers' abuses of the judicial system and the resulting need to ensure that such abuses were not repeated.[20] Indeed, the court found Chambers' actions were "part of [a] sordid scheme of deliberate misuse of the judicial process" designed "to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." 124 F.R.D., at 128. It was within the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees. Cf. *Toledo Scale*, 261 U.S., at 428, 43 S.Ct., at 466.

Third, Chambers maintains that the District Court abused its discretion by failing to require NASCO to mitigate its expenses. He asserts that had NASCO sought summary disposition of the case, the litigation could have been concluded much sooner. But, as NASCO notes, Chambers himself made a swift conclusion to the litigation by means of summary judgment impossible by continuing to assert that material factual disputes existed.

Fourth, Chambers challenges the District Court's imposition of sanctions for conduct before other tribunals, including the FCC, the Court of Appeals, and this

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[20] In particular, Chambers challenges the assessment of attorney's fees in connection with NASCO's claim for delay damages and with the closing of the sale. As NASCO points out, however, Chambers' bad-faith conduct in the course of the litigation caused the delay for which damages were sought and greatly complicated the closing of the sale, through the cloud on the title caused by the fraudulent transfer.

Court, asserting that a court may sanction only conduct occurring in its presence. Our cases are to the contrary, however. As long as a party receives an appropriate hearing, as did Chambers, see 124 F.R.D., at 141, n. 11, the party may be sanctioned for abuses of process occurring beyond the courtroom, such as disobeying the court's orders. See *Young*, 481 U.S., at 798, 107 S.Ct., at 2132; *Toledo Scale, supra*, 261 U.S., at 426-428, 43 S.Ct., at 465-466. Here, for example, Chambers' attempt to gain the FCC's permission to build a new transmission tower was in direct contravention of the District Court's orders to maintain the status quo pending the outcome of the litigation, and was therefore within the scope of the District Court's sanctioning power.

Finally, Chambers claims the award is not "personalized," because the District Court failed to conduct any inquiry into whether he was personally responsible for the challenged conduct. This assertion is flatly contradicted by the District Court's detailed factual findings concerning Chambers' involvement in the sequence of events at issue. Indeed, the court specifically held that "the extraordinary amount of costs and expenses expended in this proceeding were caused not by lack of diligence or any delays in the trial of this matter by NASCO, NASCO's counsel or the Court, but solely by the relentless, repeated fraudulent and brazenly unethical efforts of Chambers" and the others. 124 F.R.D., at 136. The Court of Appeals saw no reason to disturb this finding. 894 F.2d, at 706. Neither do we.

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit is

Affirmed.

Justice SCALIA, dissenting.

I agree with the Court that Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to "[t]he judicial Power," U.S. Const., Art. III, § 1, that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings.

> "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt – imprison for contumacy – inforce the observance of order, & c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute. . . . " *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812).

I think some explanation might be useful regarding the "bad faith" limitation that the Court alludes to today, see *ante*, at 2134. Since necessity does not depend upon a litigant's state of mind, the inherent sanctioning power must extend to situations involving less than bad faith. For example, a court has the power to dismiss when

counsel fails to appear for trial, even if this is a consequence of negligence rather than bad faith.

> "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 82 S.Ct. 1386, 1388-1389, 8 L.Ed.2d 734 (1962).

However, a "bad-fatih" limitation upon the particular sanction of attorney's fees derives from our jurisprudence regarding the so-called American Rule, which provides that the prevailing party must bear his own attorney's fees, and cannot have them assessed against the loser. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). That rule, "deeply rooted in our history and in congressional policy," *id*, at 271, 95 S.Ct., at 1628, prevents a court (without statutory authorization) from engaging in what might be termed *substantive* fee-shifting, that is, fee-shifting as part of the merits award. It does not in principle bar fee-shifting as a sanction for procedural abuse, see *id.*, at 258-259, 95 S.Ct., at 1622-1623. We have held, however – in my view as a means of preventing erosion or evasion of the American Rule – that even fee-shifting as a sanction can only be imposed for litigation conduct characterized by bad faith. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980). But that in no way means that *all* sanctions imposed under the courts' inherent authority require a finding of bad faith. They do not. See *Redfield v. Ystalyfera Iron Co.*,

110 U.S. 174, 176, 3 S.Ct. 570-571, 28 L.Ed. 109 (1884) (dismissal appropriate for unexcused delay in prosecution); cf. *Link, supra.*

Just as Congress may to some degree specify the manner in which the inherent or constitutionally assigned powers of the President will be exercised, so long as the effectiveness of those powers is not impaired, cf. *Myers v. United States,* 272 U.S. 52, 128, 47 S.Ct. 21, 29, 71 L.Ed. 160 (1926), so also Congress may prescribe the means by which the courts may protect the integrity of their proceedings. A court must use the prescribed means unless for some reason they are inadequate. In the present case they undoubtedly were. Justice KENNEDY concedes that some of the impairments of the District Court's proceedings in the present case were not sanctionable under the Federal Rules. I have no doubt of a court's authority to go beyond the Rules in such circumstances. And I agree with the Court that an overall sanction resting at least in substantial portion upon the court's inherent power need not be broken down into its component parts, with the action sustainable under the Rules separately computed. I do not read the Rules at issue here to require that, and it is unreasonable to import such needless complication by implication.

I disagree, however, with the Court's statement that a court's inherent power reaches conduct "beyond the court's confines" that does not " 'interfer[e] with the conduct of trial,' " *ante,* at 2132 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 798, 107 S.Ct. 2124, 2132, 95 L.Ed.2d 740 (1987)). See *id.,* at 819-822, 107 S.Ct., at 2144-2145 (SCALIA, J., concurring in judgment); *Bank of Nova Scotia v. United States,* 487 U.S. 250, 264, 108

S.Ct. 2369, 2378, 101 L.Ed.2d 228 (1988) (SCALIA, J., concurring). I emphatically agree with Justice KENNEDY, therefore, that the District Court here had no power to impose any sanctions for petitioner's flagrant, bad-faith breach of contract; and I agree with him that it appears to have done so. For that reason, I dissent.

Justice KENNEDY, with whom THE CHIEF JUSTICE and Justice SOUTER join, dissenting.

Today's decision effects a vast expansion of the power of federal courts, unauthorized by rule or statute. I have no doubt petitioner engaged in sanctionable conduct that warrants severe corrective measures. But our outrage at his conduct should not obscure the boundaries of settled legal categories.

With all respect, I submit the Court commits two fundamental errors. First, it permits the exercise of inherent sanctioning powers without prior recourse to controlling rules and statutes, thereby abrogating to federal courts Congress' power to regulate fees and costs. Second, the Court upholds the wholesale shift of respondent's attorney's fees to petitioner, even though the District Court opinion reveals that petitioner was sanctioned at least in part for his so-called bad faith breach of contract. The extension of inherent authority to sanction a party's prelitigation conduct subverts the American Rule and turns the *Erie* doctrine upside down by punishing petitioner's primary conduct contrary to Louisiana law. Because I believe the proper exercise of inherent powers requires exhaustion of express sanctioning provisions and much greater caution in their application to redress prelitigation conduct, I dissent.

I

The Court's first error lies in its failure to require reliance, when possible, on the panoply of express sanctioning provisions provided by Congress.

A

The American Rule prohibits federal courts from awarding attorney's fees in the absence of a statute or contract providing for a fee award. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259, 95 S.Ct. 1612, 1622-1623, 44 L.Ed.2d 141 (1975). The Rule recognizes that Congress defines the procedural and remedial powers of federal courts, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10, 61 S.Ct. 422, 424-425, 85 L.Ed. 479 (1941); *McIntire v. Wood*, 7 Cranch 504, 505-506, 3 L.Ed. 420 (1813), and controls the costs, sanctions, and fines available there, *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. ___, ___, 110 S.Ct. 1570, 1576, 108 L.Ed.2d 842 (1990) ("[T]he allocation of the costs accruing from litigation is a matter for the legislature, no the courts"); *Alyeska Pipeline Co., supra*, 421 U.S., at 262, 95 S.Ct., at 1624 ("[T]he circumstances under which attorney's fees are to be awarded an the range of discretion of the courts in making those awards are matters for Congress to determine").

By direct action and delegation, Congress has exercised this constitutional prerogative to provide district courts with a comprehensive arsenal of Federal Rules and statutes to protect themselves from abuse. A district court can punish contempt of its authority, including disobedience of its process, by fine or imprisonment, 18 U.S.C. § 401; award costs, expenses, and attorney's fees against

attorneys who multiply proceedings vexatiously, 28 U.S.C. § 1927; sanction a party and/or the party's attorney for filing groundless pleadings, motions, or other papers, Fed. Rule Civ. Proc. 11; sanction a party and/or his attorney for failure to abide by a pretrial order, Fed. Rule Civ. Proc. 16(f); sanction a party and/or his attorney for baseless discovery requests or objections, Fed. Rule Civ. Proc. 26(g); award expenses caused by a failure to attend a deposition or to serve a subpoena on a party to be deposed, Fed. Rule Civ. Proc. 30(g); award expenses when a party fails to respond to discovery request or fails to participate in the framing of a discovery plan, Fed. Rule Civ. Proc. 37(d) and (g); dismiss an action or claim of a party that fails to prosecute, to comply with the Federal Rules, or to obey an order of the court, Fed. Rule Civ. Proc. 41(b); punish any person who fails to obey a subpoena, Fed. Rule Civ. Proc. 45(f); award expenses and/or contempt damages when a party presents an affidavit in a summary judgment motion in bad faith or for the purpose of delay, Fed. Rule Civ. Proc. 56(g); and make rules governing local practice that are not inconsistent with the Federal Rules, Fed. Rule Civ. Proc. 81. See also 28 U.S.C. § 1912 (power to award just damages and costs on affirmance); Fed.Rule App. Proc. 38 (power to award damages and costs for frivolous appeal).

The Court holds nonetheless that a federal court may ignore these provisions and exercise inherent power to sanction bad faith misconduct "even if procedural rules exist which sanction the same conduct." *Ante*, at 2135. The Court describes the relation between express sanctioning provisions and inherent power to shift fees as a sanction for bad faith conduct in a number of ways. At

one point it states that where "neither the statute nor the rules are up to the task [*i.e.*, cover all the sanctionable conduct], the court may safely rely on its inherent power." *Ante*, at 2136. At another it says that courts may place exclusive reliance on inherent authority whenever "conduct sanctionable under the rules was intertwined within conduct that only the inherent power could address." *Ante*, at 2135-2136. While the details of the Court's rule remain obscure, its general approach is clear: When express rules and statutes provided by Congress do not reach the entirety of a litigant's bad faith conduct, including conduct occurring before litigation commenced, a district court may disregard the requirements of otherwise applicable rules and statutes and instead exercise inherent power to impose sanctions. The only limitation on this sanctioning authority appears to be a finding at some point of "bad faith," a standard the Court fails to define.

This explanation of the permitted sphere of inherent powers to shift fees as a sanction for bad faith litigation conduct is as illegitimate as it is unprecedented. The American Rule recognizes that the legislature, not the judiciary, possesses constitutional responsibility for defining sanctions and fees; the bad faith exception to the Rule allows courts to assess fees not provided for by Congress "in narrowly defined circumstances." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980). By allowing courts to ignore express Rules and statutes on point, however, the Court treats inherent powers as the norm and textual bases of authority as the exception. And although the Court recognizes that Congress in theory may channel inherent

powers through passage of sanctioning rules, it relies on *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982), a decision that has nothing to do with inherent authority, to create a powerful presumption against congressional control of judicial sanctions. *Ante*, at 2134.

The Court has the presumption backwards. Inherent powers are the exception, not the rule, and their assertion requires special justification in each case. Like all applications of inherent power, the authority to sanction bad faith litigation practices can be exercised only when necessary to preserve the authority of the court. See *Roadway Express, Inc. v. Piper, supra*, 447 U.S., at 764, 100 S.Ct., at 2463 (inherent powers " 'are those which are necessary to the exercise of all others' "); *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 819-820, 107 S.Ct. 2124, 2144, 95 L.Ed.2d 740 (1987) (SCALIA, J., concurring in judgment) (inherent powers only those "necessary to permit the courts to function").

The necessity limitation, which the Court brushes aside almost without mention, *ante*, at 2132, prescribes the rule for the correct application of inherent powers. Although this case does not require articulation of a comprehensive definition of the term "necessary," at the very least a court need not exercise inherent power if Congress has provided a mechanism to achieve the same end. Consistent with our unaltered admonition that inherent powers must be exercised "with great caution," *Ex parte Burr*, 9 Wheat. 529, 531, 6 L.Ed. 152 (1824), the necessity predicate limits the exercise of inherent powers to those exceptional instances in which congressionally authorized powers fail to protect the processes of the

Court. Inherent powers can be exercised only when necessary, and there is no necessity if a rule or statute provides a basis for sanctions. It follows that a district court should rely on text-based authority derived from Congress rather than inherent power in every case where the text-based authority applies.

Despite the Court's suggestion to the contrary, *ante*, at 2134, our cases recognize that rules and statutes limit the exercise of inherent authority. In *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), we rejected the Court of Appeals' reliance on inherent powers to uphold a dismissal of a complaint for failure to comply with a production order. Noting that "[r]eliance upon . . . 'inherent power' can only obscure analysis of the problem," we held that "whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37." *Id.*, at 207, 78 S.Ct., at 1093. Similarly, in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S.Ct. 2369, 2373, 101 L.Ed.2d 228 (1988), we held that a federal court could not invoke its inherent supervisory power to circumvent the harmless error inquiry prescribed by Fed.Rule Crim. Proc. 52(a). And *Ex parte Robinson*, 19 Wall. 505, 22 L.Ed. 205 (1874), the very case the Court cites for the proposition that " '[t]he power to punish for contempt is inherent in all courts,' " *ante*, at 2132, held that Congress had defined and limited this inherent power through enactment of the contempt statute. "The enactment is a limitation upon the manner in which the [contempt] power shall be exercised." 19 Wall., at 512.

The Court ignores these rulings and relies instead on two decisions which "indicat[e] that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Ante,* at 2135. The "indications" the Court discerns in these decisions do not withstand scrutiny. In *Roadway Express, Inc. v. Piper, supra,* we held that the costs recoverable under a prior version of 28 U.S.C. § 1927 for discovery abuse did not include attorney's fees. In the remand instruction, the Court mentioned that the District Court might consider awarding attorney's fees under either Fed.Rule Civ.Proc. 37 or its inherent authority to sanction bad-faith litigation practices. 447 U.S., at 767-768, 100 S.Ct., at 2464-2465. The decision did not discuss the relation between Rule 37 and the inherent power of federal courts, and certainly did not suggest that federal courts could rely on inherent powers to the exclusion of a federal rule on point.

The Court also misreads *Link v. Wabash R. Co.,* 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). *Link* held that a Federal District Court possessed inherent power to dismiss a case *sua sponte* for failure to prosecute. The majority suggests that this holding contravened a prior version of Fed.Rule Civ. Proc. 41(b), which the Court today states "appeared to *require* a motion from a party," *ante,* at 2134-2135 (emphasis added). Contrary to the Court's characterization, the holding in *link* turned on a determination that Rule 41(b) contained *"permissive* language . . . which merely authorizes a motion by the defendant," 370 U.S., at 630, 82 S.Ct., at 1388 (emphasis added). *Link* reasoned that "[n]either the permissive language of the Rule . . . nor its policy" meant that the rule "abrogate[d]" the inherent power of federal courts to

dismiss *sua sponte*. The permissive language at issue in *Link* distinguishes it from the present context, because some sanctioning provisions, such as Rule 11 and Rule 26(g), are cast in mandatory terms.

In addition to dismissing some of our precedents and misreading others, the Court ignores the commands of the Federal Rules of Civil Procedure, which support the conclusion that a court should rely on rules, and not inherent powers,whenever possible. Like the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States, supra*, 487 U.S., at 255, 108 S.Ct., at 2374. See also Fed.Rule Civ.Proc. 1 (Federal Rules "*govern* the procedure in the United States district courts in *all* suits of a civil nature") (emphasis added). Two of the most prominent sanctioning provisions, Rules 11 and 26(g), mandate the imposition of sanctions when litigants violate the Rules' certification standards. See Fed.Rule Civ.Proc 11 (court "shall impose . . . an appropriate sanction" for violation of certification standard); Fed.Rule Civ. Proc. 26(g) (same); see also *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.* 498 U.S. ___, ___, 111 S.Ct. 922, 929 (Rule 11 "requires that sanctions be imposed where a signature is present but fails to satisfy the certification standard").

The Rules themselves thus reject the contention that they may be discarded in a court's discretion. Disregard of applicable rules also circumvents the rulemaking procedures in 28 U.S.C. § 2071 *et seq.*, which Congress

designed to assure that procedural innovations like those announced today "all be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Miner v. Atlass*, 363 U.S. 641, 650, 80 S.Ct. 1300, 1306, 4 L.Ed.2d 1462 (1960).

B

Upon a finding of bad faith, courts may now ignore any and all textual limitations on sanctioning power. By inviting district courts to rely on inherent authority as a substitute for attention to the careful distinctions contained in the rules and statutes, today's decision will render these sources of authority superfluous in many instances. A number of pernicious practical effects will follow.

The Federal Rules establish explicit standards for, and explicit checks against, the exercise of judicial authority. Rule 11 provides a useful illustration. It requires a district court to impose reasonable sanctions, including attorneys fees, when a party or attorney violates the certification standards that attach to the signing of certain legal papers. A district court must (rather than may) issue sanctions under Rule 11 when particular individuals (signers) file certain types (groundless, unwarranted, vexatious) of documents (pleadings, motions and papers). Rule 11's certification requirements apply to all signers of documents, including represented parties, see *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., supra*, but law firms are not responsible for the

signatures of their attorneys, see *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, ___, 110 S.Ct. 456, ___, 107 L.Ed.2d 438 (1989), and the Rule does not apply to papers filed in fora other than district courts, see *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, ___, 110 S.Ct. 2447, ___, 110 L.Ed.2d 359 (1990). These definite standards give litigants notice of proscribed conduct and make possible meaningful review for misuse of discretion – review which focuses on the misapplication of legal standards. See *id.*, at ___, 110 S.Ct., at 2459 (misuse of discretion standard does "not preclude the appellate court's correction of a district court's legal errors").

By contract, courts apply inherent powers without specific definitional or procedural limits. True, if a district court wishes to shift attorney's fees as a sanction, it must make a finding of bad faith to circumvent the American Rule. But today's decision demonstrates how little guidance or limitation the undefined bad faith predicate provides. The Court states without elaboration that courts must "comply with the mandates of due process . . . in determining that the requisite bad faith exists," *ante*, at 2136, but the Court's bad-faith standard, at least without adequate definition, thwarts the first requirement of due process, namely, that "[a]ll are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). This standardless exercise of judicial power may appear innocuous in this litigation between commercial actors. But the same unchecked power also can be applied to chill the advocacy of litigants attempting to vindicate all other important federal rights.

In addition, the scope of sanctionable conduct under the bad-faith rule appears unlimited. As the Court boasts, "whereas each of the other mechanisms [in Rules and statutes] reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses." *Ante*, at 2134. By allowing exclusive resort to inherent authority whenever "conduct sanctionable under the rules was intertwined within conduct that only the inherent power could address." *ante*, at 2135-2136, the Court encourages all courts in the federal system to find bad faith misconduct in order to eliminate the need to rely on specific textual provisions. This will ensure the uncertain development of the meaning and scope of these express sanctioning provisions by encouraging their disuse, and will defeat, at least in the area of sanctions, Congress' central goal in enacting the Federal Rules – " 'uniformity in the federal courts.' " *Hanna v. Plumer*, 380 U.S. 460, 472, 85 S.Ct. 1136, 1145, 14 L.Ed.2d 8 (1965). Finally, as Part IV of the Court's opinion demonstrates, the lack of any legal requirement other than the talismanic recitation of the phrase "bad faith" will foreclose meaningful review of sanctions based on inherent authority. See *Cooter & Gell v. Hartmarx Corp., supra*, 496 U.S., at ___, 110 S.Ct., at 2459.

Despite these deficiencies, the Court insists that concern about collateral litigation requires courts to place exclusive reliance on inherent authority in cases, like this one, which involve conduct sanctionable under both express provisions and inherent authority:

> "In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes

> containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves." *Ante*, at 2136.

We are bound, however, by the Rules themselves, not their "aim," and the Rules require that they applied, in accordance with their terms, to much of the conduct in this case. We should not let policy concerns about the litigation effects of following the Rules distort their clear commands.

Nothing in the foregoing discussion suggests that the fee-shifting and sanctioning provisions in the Federal Rules and Title 28 eliminate the inherent power to impose sanctions for certain conduct. Limitations on power do not constitute its abrogation. Cases can arise in which a federal court must act to preserve its authority in a manner not provided for by the Federal Rules or Title 28. But as the number and scope of rules and statutes governing litigation misconduct increase, the necessity to resort to inherent authority – a predicate to its proper application – lessens. Indeed, it is difficult to imagine a case in which a court can, as the District Court did here, rely on inherent authority as the exclusive basis for sanctions.

C

The District Court's own findings concerning abuse of its processes demonstrate that the sanctionable conduct in this case implicated a number of rules and statutes upon which it should have relied. Rule 11 is the

principle provision on point. The District Court found that petitioner and his counsel filed a number of "frivolous pleadings" (including "baseless, affirmative defenses and counterclaims") that contained "deliberate untruths and fabrication." *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120, 127-128, 135 (WD La.1989). Rule 11 sanctions extend to "the person who signed [a paper], a represented party, or both." The Court thus had a nondefeasible duty to impose sanctions under Rule 11.

The Court concedes that Rule 11 applied to some of the conduct in this case, *ante*, at 2135, and even hints that the Rule might have suffered as a basis for all of the sanctions imposed, *ante*, at 2131 n. 8. It fails to explain, however, why the District Court had the discretion to ignore Rule 11's mandatory language and not impose sanctions under the Rule against Chambers. Nor does the Court inform us why Chambers' attorneys were not sanctioned under Rule 11. Although the District Court referred to Chambers as the "strategist" for the abusive conduct, it made plain that petitioner's attorneys as well as petitioner were responsible for the tactics. For example, the District Court stated:

> "[Petitioner's] attorneys, without any investigation whatsoever, filed [the baseless charges and counterclaims]. We find . . . that these attorneys knew, at the time that they were filed, that they were false." 124 F.R.D., at 128.

The Court further stressed that "Chambers, though his attorneys, filed answers and counterclaims . . . which both Chambers and his attorneys knew were false at the time they were filed." *Id.*, at 143. In light of Rule 11's mandatory language, the District Court had a duty to

impose at least some sanctions under Rule 11 against Chambers' attorneys.

The District Court should have relied as well upon other sources of authority to impose sanctions. The Court found that Chambers and his attorneys requested "[a]bsolutely needless depositions" as well as "continuances of trial dates, extensions of deadlines and deferments of scheduled discovery" that "were simply part of the sordid scheme of deliberate misuse of the judicial process to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." *Id.*, at 128. The intentional pretrial delays could have been sanctioned under Fed.Rule Civ.Proc. 16(f) which enables courts to impose sanctions, including attorney's fees, when a party or attorney "fails to participate in good faith" in certain pretrial proceedings; the multiple discovery abuses should have been redressed by "an appropriate sanction . . . including a reasonable attorney's fee," under Fed.Rule Civ.Proc. 26(g). The District Court also could have sanctioned Chambers and his attorneys for the various bad-faith affidavits they presented in their summary judgment motions, see 124 F.R.D., at 128, 135, under Fed.R.Civ.P. 56(g), a Rule that permits the award of expenses and attorney's fees and the additional sanction of contempt. In addition, the District Court could have relied to a much greater extent on 18 U.S.C.§ 401 to punish the "contempt of its authority" and "[d]isobedience . . . to its . . . process" that petitioner and his counsel displayed throughout the proceedings.

Finally, the District Court was too quick to dismiss reliance on 28 U.S.C.§ 1927, which allows it to award

costs and attorney's fees against an "attorney . . . who . . . multiplies the proceedings in any case unreasonably and vexatiously." The District Court refused to apply the provision because it did not reach petitioner's conduct as a nonattorney. 124 F.R.D., at 138-139. While the District Court has discretion not to apply § 1927, it cannot disregard the statute in the face of attorney misconduct covered by that provision to rely instead on inherent powers which by definition can be invoked only when necessary.

II

When a District Court imposes sanctions so immense as here under a power so amorphous as inherent authority, it must ensure that its order is confined to conduct under its own authority and jurisdiction to regulate. The District Court failed to discharge this obligation, for it allowed sanctions to be awarded for petitioner's prelitigation breach of contract. The majority, perhaps wary of the District Court's authority to extend its inherent power to sanction prelitigation conduct, insists that "the District Court did not attempt to sanction petitioner for breach of contract, but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the Court throughout the course of the litigation." *Ante*, at 2138 (footnote omitted). Based on this premise, the Court appears to disclaim that its holding reaches prelitigation conduct. *Ante*, at 2138, and nn. 16-17. This does not make the opinion on this point correct, of course, for the District Court's opinion, in my view, sanctioned petitioner's prelitigation conduct in express terms. Because I disagree

with the Court's characterization of the District Court opinion, and because I believe the Court's casual analysis of inherent authority portends a dangerous extension of that authority to prelitigation conduct, I explain why inherent authority should not be so extended and why the District Court's order should be reversed.

The District Court's own candid and extensive opinion reveals that the bad faith for which petitioner was sanctioned extended beyond the litigation tactics and comprised as well what the District Court considered to be bad faith in refusing to perform the underlying contract three weeks before the lawsuit began. The Court made explicit reference, for instance, to "this massive and absolutely unnecessary lawsuit forced on NASCO by Chambers' arbitrary and arrogant refusal to honor and perform this perfectly legal and enforceable contract." 124 F.R.D., at 136. See also *id.*, at 143 ("Chambers arbitrarily and without legal cause to perform, forcing NASCO to bring its suit for specific performance"); *ibid.* ("Chambers, knowing that NASCO had a good and valid contract, hired Gray to find a defense and arbitrarily refused to perform, thereby forcing NASCO to bring its suit for specific performance and injunctive relief"); *id.*, at 125 (petitioner's "unjustified and arbitrary refusal to file" the FCC application "was in absolute bad faith"). The District Court makes the open and express concession that it is sanctioning petitioner for his breach of contract:

> "[T]he balance of . . . fees and expenses included in the sanctions, would not have been incurred by NASCO if Chambers had not defaulted and forced NASCO to bring this suit. There is absolutely no reason why Chambers should not

> reimburse in full all attorney's fees and expenses that NASCO by Chambers' action, was forced to pay." *Id.*, at 143.

The trial court also explained that "[t]he attorney's fees and expenses charged to NASCO by its attorneys . . . *flowed from and were a direct result of this suit.* We shall include them in the attorney's fees sanctions." *Id.*, at 142 (emphasis added).

Despite the Court's equivocation on the subject, *ante*, at 2138, n. 16, it is impermissible to allow a District Court acting pursuant to its inherent authority to sanction such prelitigation primary conduct. A Court's inherent authority extends only to remedy abuses of the judicial process. By contrast, awarding damages for a violation of a legal norm, here the binding obligation of a legal contract, is a matter of substantive law, see *Marek v. Chesny*, 473 U.S. 1, 35, 105 S.Ct. 3012, 3030, 87 L.Ed.2d 1 (1985) ("right to attorney's fees is 'substantive' under any reasonable definition of that term"); see also *Alyeska*, 421 U.S., at 260-261, and n. 33, 95 S.Ct., at 1623-1624, and n. 33, which must be defined either by Congress (in cases involving federal law), or by the States (in diversity cases).

The American Rule recognizes these principles. It bars a federal court from shifting fees as a matter of substantive policy, but its bad faith exception permits fee shifting as a sanction to the extent necessary to protect the judicial process. The Rule protects each person's right to go to federal court to define and to vindicate substantive rights. "[S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18

L.Ed.2d 475 (1967). When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule and violates the Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it.

By exercising inherent power to sanction prelitigation conduct, the District Court exercised authority where Congress gave it none. The circumstance that this exercise of power occurred in a diversity case compounds the error. When a federal court sits in diversity jurisdiction, it lacks constitutional authority to fashion rules of decision governing primary contractual relations. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); *Hanna v. Plumer*, 380 U.S., at 471-472, 85 S.Ct., at 1143-1145. See generally Ely, The Irrepressible Myth of *Erie*, 87 Harv.L.Rev. 693, 702-706 (1974). the *Erie* principle recognizes that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of the State." 304 U.S., at 78, 58 S.Ct., at 822. The inherent power exercised here violates the fundamental tenet of federalism announced in *Erie* by regulating primary behavior that the Constitution leaves to the exclusive province of States.

The full effect of the District Court's encroachment on State prerogatives can be appreciated by recalling that the rationale for the bad faith exception is punishment. *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973). To the extent that the District Court imposed sanctions by reason of the so-called bad-faith breach of contract, its decree is an award of punitive damages for

the breach. Louisiana prohibits punitive damages "unless expressly authorized by statute," *International Harvester Credit Corp. v. Seale*, 518 So.2d 1039, 1041 (La.1988); and no Louisiana statute authorizes attorney's fees for breach of contract as a part of damages in an ordinary case. *Ogea v. Loffland Brothers Co.*, 622 F.2d 186, 190 (CA5 1980); *Rutherford v. Impson*, 366 So.2d 944, 947 (La.App.1978). One rationale for Louisiana's policy is its determination that "an award of compensatory damages will serve the same deterrent purpose as an award of punitive damages." *Ricard v. State*, 390 So.2d 882, 886 (La. 1980). If respondent had brought this suit in state court he would not have recovered extra damages for breach of contract by reason of the so-called willful character of the breach. Respondent's decision to bring this suit in federal rather than state court resulted in a significant expansion of the substantive scope of his remedy. This is the result prohibited by *Erie* and the principles that flow from it.

As the Court notes, *ante*, at 2138, n. 17, there are some passages in the District Court opinion suggesting its sanctions were confined to litigation conduct. See *ante*, at 2138, n. 17. ("[T]he sanctions imposed 'appl[ied] only to sanctionable acts which occurred in connection with the proceedings in the trial Court' "). But these passages in no way contradict the other statements by the trial court which make express reference to prelitigation conduct. At most, these passages render the court's order ambiguous, for the District Court appears to have adopted an expansive Definition of "acts which occurred in connection with" the litigation. There is no question but that some sanctionable acts did occur in court. The problem is that the District Court opinion avoids any clear delineation of

the acts being sanctioned and the power invoked to do so. This confusion in the premises of the District Court's order highlights the mischief caused by reliance on undefined inherent powers rather than on Rules and statutes that proscribe particular behavior. The ambiguity of the scope of the sanctionable conduct cannot be resolved against petitioner alone, who, despite the conceded bad-faith conduct of his attorneys, has been slapped with all of respondent's not inconsiderable attorney's fees. At the very least, adherence to the rule of law requires the case to be remanded to the District Court for clarification on the scope of the sanctioned conduct.

III

My discussion should not be construed as approval of the behavior of petitioner and his attorneys in this case. Quite the opposite. Our Rules permit sanctions because much of the conduct of the sort encountered here degrades the profession and disserves justice. District courts must not permit this abuse and must not hesitate to give redress through the Rules and statutes prescribed. It may be that the District Court could have imposed the full million dollar sanction against petitioner through reliance on federal Rules and statutes, as well as on a proper exercise of its inherent authority. But we should remand here because a federal court must decide cases based on legitimate sources of power. I would reverse the Court of Appeals with instructions to remand to the District Court for a reassessment of sanctions consistent with the principles here set forth. For these reasons, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4702

NASCO, INC.,

Plaintiff-Appellee,

VERSUS

CALCASIEU TELEVISION AND RADIO, INC. and RUSSELL CHAMBERS,

Defendants,

and

RICHARD A. CURRY,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(CV 83 2564)

(September 13, 1991)

BEFORE REYNALDO G. GARZA, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Richard A. Curry appeals, for the second time, his six-month suspension from practicing law before the

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular

(Continued on following page)

United States District Court for the Western District of Louisiana. We **AFFIRM.**

I.

The facts underlying this action are detailed in several opinions, including *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120 (W.D. La. 1989), 894 F.2d 696 (5th Cir. 1990), *aff'd sub nom. Chambers v. NASCO, Inc.*, ___ U.S. ___, 111 S. Ct. 2123 (1991). Accordingly, we summarize the pertinent facts and proceedings.

The underlying action concerned an agreement to sell a television station. The plaintiff was NASCO; the defendants were: Calcasieu Television & Radio, Inc. (CTR), the owner and defaulting seller; Chambers, the sole shareholder and director of CTR, the signatory on the agreement (for CTR and individually) and the party responsible for breaching the agreement; and Baker, Chambers' sister and the trustee of a sham trust. The defendants' lawyers were Curry, representing Baker; and Gray and McCabe, representing Chambers and CTR.

NASCO filed the action in 1983, in part seeking specific performance and an injunction prohibiting transfer of the property in violation of the agreement. The sellers' attorneys received notice of NASCO's intended suit before Sunday, October 16, 1983, the day that they created

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(Continued from previous page)

cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

a sham trust and transferred property to it in violation of the agreement "and for the admitted purpose of placing [the] properties beyond the jurisdiction of [the district court]." 124 F.R.D. at 122. After repeated delays, a bench trial was held in April 1985, with judgment for NASCO in November 1985. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 623 F. Supp. 1372 (W.D. La. 1985).

The defendants appealed and sought, unsuccessfully, a stay in the district court and this court. At the close of oral argument on appeal, this court, from the bench, affirmed the judgment, declared the appeal frivolous and dilatory, imposed appellate sanctions against the appellants, and remanded for the district court to determine: (1) the appropriate amount of appellate costs and attorney's fees; and (2) whether sanctions should also be imposed for the manner in which the case had been conducted in district court. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, No. 86-4003 (5th Cir. Aug. 6, 1986) (per curiam); amended Aug. 6, 1986 order (5th Cir. Aug. 11, 1986); and opinion in support of Aug. 6, 1986 order (5th Cir. Aug. 27, 1986) (all unpublished).

Consistent with the remand, the district court held an evidentiary hearing in April 1988, and rendered a detailed and comprehensive opinion in January 1989, imposing sanctions against the defendants and their lawyers under its inherent power. *NASCO*, 124 F.R.D. at 123, 146. Curry was suspended from practicing law in the Western District of Louisiana for six months, moved unsuccessfully for reconsideration by the Western District en banc, and then appealed to this court, as did CTR, Chambers, Gray, and McCabe. This court affirmed. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d

696 (5th Cir. 1990). However, on Curry's motion for rehearing, it remanded on May 4, 1990 (No. 89-4137; unpublished order) for reconsideration as to Curry only, stating:

> Curry vehemently denies that his conduct subjected him to suspension under the court's inherent powers; he protests that he did little more than sign pleadings. He insists that he did not receive an adequate opportunity to defend himself. We are persuaded that we should remand the case as to Curry only. On remand the district court will allow Curry to offer any relevant argument and evidence he may have. The district court may then reinstate, supplement or change its present findings and any ordered sanctions as it finds appropriate. *We do not hold that the imposed sanction was an inappropriate response to the district court's perception of Curry's role. Curry seeks a further opportunity to dispel that perception. We do no more than allow him to do so, perhaps out of an excess of caution.*

(Emphasis added.)

On July 6, 1990, the district court held the evidentiary hearing for this second remand. On August 18, 1990, it reinstated its original sanction. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, No. 83-2564 (W.D. La. August 18, 1990) (unpublished order). The district court stated:

> This court is deeply conscious of the seriousness of the sanctions imposed upon each of the defendant attorneys. We respect the similar concern of the Court of Appeals. It is our opinion that the evidentiary hearing of July 6, 1990 has at least laid to rest the issue of due process.

* * *

> We have considered the arguments and evidence produced by Curry to determine whether we should reinstate, supplement or change our original findings. We find nothing in the documentary evidence or in the testimony of witnesses . . . or in the closing argument at the July 6, 1990 hearing which would have even a slight effect on our original findings.

Accordingly, the district court reinstated its "original findings and conclusions without change or alteration" and confirmed its original sanction. The Western District denied Curry's motion for reconsideration en banc, and Curry timely appealed again to this court.

II.

Curry contends that the district court: (1) misinterpreted the scope of this court's second remand; (2) imposed sanctions without an adequate factual basis; and (3) improperly cited, and found violations of, Louisiana State Bar Association disciplinary rules which were not in effect at the time of the charged misconduct.[2]

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[2] Curry also contended that in imposing sanctions against him, the district court could not use its inherent power. However, before oral argument, the Supreme Court rendered its decision in *Chambers v. NASCO, Inc.*, ___ U.S. ___, 111 S. Ct. 2123, 2134 (1991) (court's inherent power to impose sanctions for bad-faith conduct is not displaced by sanction scheme of statute and rules). At oral argument, he withdrew this issue.

A.

The district court did not misinterpret the remand. Curry's argument centers on the district judge's statement at the beginning of the second remand hearing (July 1990):

> Before we begin – and I don't want to limit the testimony or the argument or anything else in this matter unduly or at all, as a matter of fact; but much of the argument – and it's very well-made in the briefs – is on the validity of the sanctions. I think the counsel should bear in mind the fact that the sanctions were found by this [c]ourt and . . . have been sustained by the Court of Appeal. So I just ask you to bear that in mind.

Curry's lawyer responded:

> Yes, Your Honor, I am aware of the fact. . . . What we would like to do with the Court's permission is review what Mr. Curry did in the hopes that the Court might reconsider what it did and if possible recall the sanctions as against Mr. Curry. To that extent, we would like to file and offer into evidence testimony.

The Court replied: "All right. I have no objection to that."

The district judge did not limit Curry's testimony in any way, allowing in evidence every item Curry requested, including affidavits. He concluded that nothing Curry presented in the second remand evidentiary hearing altered his previous findings or his conclusion as to the appropriate sanction. The district judge understood clearly his ability to "reinstate, supplement or change its . . . findings and any ordered sanctions as it [found]

appropriate", as stated in this court's remand instructions.

B.

Curry contends that the record does not support the subjective findings made in the trial court's original sanctions opinion. He maintains that he did nothing except file pleadings and that those pleadings do not justify the imposition of any sanction, much less suspension.

In this court's prior opinion, it stated that the district court could have disbarred the appellants, including Curry, "only on the strength of clear and convincing evidence that they committed a disbarment offense." 894 F.2d at 708. And, after examining the record, it concluded that clear and convincing evidence supported the district court's findings, giving as examples that "all three [lawyers] repeatedly urged the frivolous public records doctrine defense" and, that Curry and another appellant made "baseless arguments for recusal of the district judge." *Id.* As discussed, this court later remanded only as to Curry.

As stated in the recent opinion in *Chambers*, "[w]e review a court's imposition of sanctions under its inherent power for abuse of discretion." ___ U.S. at ___, 111 S. Ct. at 2138 (citing *Link v. Wabash R.R.*, 370 U.S. 626, 633 (1962)). Obviously, due to the limited nature of the remand, our review is even more narrow in this instance.

At the second remand hearing, Curry testified in detail about his actions that led to the sanctions. He seeks to diminish his involvement and participation. However,

the record on the second remand reveals, for example, that he supported in this court a meritless writ of mandamus for recusal of the district judge.[3]

Curry seeks to expand the limited nature of remand. This court will not, nor can it, review and re-evaluate the holding in its prior opinion at 894 F.2d 696. Based on our review of the record for the second remand, the district court complied with our remand instructions. Especially in light of that limited remand, we do not find an abuse of discretion. Nor do we find other error that would compel reversal.[4]

III.

For the foregoing reasons, the sanction imposed by the district court is

AFFIRMED.

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[3] Curry was less culpable than others, but the lesser sanction imposed on him accommodates this. He was suspended for six months. On the other hand, Chambers was required to pay $66,286 in appellate sanctions and $996,644 in attorney's fees and related expenses; Gray was disbarred for three years; and McCabe was declared ineligible to practice in the Western District of Louisiana for five years.

[4] As noted, Curry also challenges the district court's citation to Louisiana Rules of Professional Conduct in its findings, which rules were enacted after the conduct at issue. It is clear that the citation to the rules was simply one of its findings, not an alteration of the basis for the sanction – inherent power. Furthermore, the same standards were essentially embodied in Louisiana's Code of Professional Responsibility, in effect at the time of Curry's actions.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NASCO, INC.	:	CIVIL ACTION
-vs-	:	NO. 83-2564
CALCASIEU TELEVISION AND RADIO, INC. ET AL	:	JUDGE SCOTT

RULING

(Filed Sept. 16, 1991)

Before the court is the Motion of A. J. Gray, III (Gray) to Terminate Sanction.

By Judgment dated January 23, 1989, this Court ordered that "A. J. Gray, III be stricken from the roll of attorneys authorized to practice in the Western District of Louisiana and that he be prohibited for a period of three (3) years from making application for readmission." That Judgment was affirmed on February 6, 1990, by the United States Court of Appeals, Fifth Circuit. Consequently, Gray has served almost one-half of the term of the sanction.[1]

Gray was acutely conscious of the gravity of the motion for sanctions filed by NASCO, Inc. on December 28, 1987. Although he was lead counsel in two cases in the Western District of Louisiana at that time (see paragraph 8 of his motion), and no action had been taken by the court on the sanctions motion, he voluntarily ceased any further services in those cases after that time.

Although no actual Order of Suspension has been entered against him by the United States District Court for the Eastern District of Louisiana he nevertheless, on September 27, 1990, formally withdraw from the only case which he was handling in that court (see paragraph 10 of his motion). Because of an Order of Suspension issued against him by the United States District Court from the Middle District of Louisiana on July 2, 1990 suspending him from practice in that court, he formally withdrew from four cases which he was actively handling before that court (see paragraph 9 of his motion).

The sanctions imposed upon Gray were a precipitating cause of the restructuring and liquidation of Gray's former law firm in which he was senior member (see paragraph 3 of Gray's motion of June 8, 1990 to reduce sanction). For the same reason he has had difficulty in securing malpractice insurance (see paragraph 4 of Gray's motion of June 8, 1990 to reduce sanction).

Gray is the only attorney of those sanctioned who has sought the presence of this court and stated privately that he respects the judgment by this court and the Court of Appeals in this case. Likewise, he is the only one to do so publicly (see paragraph 6 of Gray's motion of June 8, 1990 to reduce sanction).

For these reasons we find that the purposes of Gray's suspension by this court have been served, that Gray's period of suspension should be reduced to the time already served and that his sanction should be terminated.

Alexandria, Louisiana, this 13th day of September, 1991.

/s/ Norman S. Scott
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] This court held an evidentiary hearing on July 6, 1990. This hearing was made necessary by remand of the appellate court for two purposes: (1) to enable the trial court to reconsider the five (5) year suspension of attorney Edward A. McCabe because the appellate court had been informed that the State of Massachusetts was considering sanctions against McCabe for his conduct before the trial court in this suit and (2) to receive and consider additional evidence on the sanctions which the appellate court had already affirmed and refused rehearing, because of Curry's allegations that he had not been afforded by the trial court the opportunity to introduce all of his evidence. Although the judgment against Gray had become final, on request of his counsel, we allowed Gray, on June 6, 1990, to file a motion to reduce sanctions. This motion was later denied. Under these circumstances, it is our opinion that the filing of Gray's June 6, 1990 motion and the hearing of July 6, 1990, did not disturb the finality of the decree of the appellate court dated February 6, 1990.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NASCO, INC.	:	CIVIL ACTION
-vs-	:	NO. 83-2564
CALCASIEU TELEVISION AND RADIO, INC. ET AL	:	JUDGE SCOTT

JUDGMENT

(Filed Sept. 16, 1991)

For written reasons this day assigned, it is

ORDERED that the suspension of A. J. Gray, III be terminated and his name be reinscribed on the roll of attorneys authorized to practice in the Western District of Louisiana, effective the date of this Judgment; it is

FURTHER ORDERED that a copy of this Judgment be forwarded to the Clerk of Court of the Middle District of Louisiana.

Alexandria, Louisiana, this 13th day of September, 1991.

/s/ Norman S. Scott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4702

NASCO, INC.,

Plaintiff-Appellee,

versus

CALCASIEU TELEVISION AND RADIO, INC.
and RUSSELL CHAMBERS,

Defendants,

and

RICHARD A. CURRY,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Louisiana

ON PETITION FOR REHEARING

(October 15, 1991)

Before REYNALDO G. GARZA, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

NASCO, INC.	:	
Plaintiff	:	NO. CV-83-2564
	:	JUDGE
VERSUS	:	NAUMAN S. SCOTT
CALCASIEU TELEVISION AND RADIO, INC., G. RUSSELL CHAMBERS, and MABEL CHRISTINE BAKER, TRUSTEE FOR THE FACILITY TRUST	:	
Defendants	:	

PLAINTIFF'S MOTION TO FIX COMPENSATORY DAMAGES PURSUANT TO CONTEMPT JUDGMENT, TO FIX APPELLATE SANCTIONS, AND TO IMPOSE SANCTIONS

The plaintiff, NASCO, Inc. (NASCO), moves this Court: (1) To fix the amount of compensatory damages awarded to NASCO pursuant to this Court's contempt judgment of March 23, 1984; (2) to fix the amount of the attorney's fees and double costs imposed as appellate sanctions under Fed. R. App. P. 38 by the United States Court of Appeals for the Fifth Circuit; and (3) to impose appropriate sanctions – including, but not limited to, all attorney's fees, expenses, and costs incurred by NASCO in these proceedings, and in the administrative proceedings before the FCC.

This motion is urged for the following reasons, and on the following grounds:

MOTION TO FIX CONTEMPT DAMAGES

1.

Made respondent on this motion is the defendant-contemnor, G. Russell Chambers (Chambers).

2.

On March 23, 1984, this Court held the defendants, Chambers and Calcasieu Television and Radio, Inc. (CTR), in civil contempt of court, and ordered those defendants to "reimburse [NASCO] for all damages, costs, and attorney's fees occasioned by their contemptuous conduct and the trial of this [contempt] proceeding." *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 121 (W.D. La. 1984).

3.

On information and belief, CTR has been liquidated, and Chambers, its sole shareholder, has received all of the assets and liabilities of that corporation as his personal assets and liabilities.

4.

In its contempt judgment, this Court ordered NASCO to submit affidavits outlining the compensatory damages referenced above. *NASCO, Inc. v. Calcasieu Television & Radio, Inc., supra*, 583 F. Supp. at 122.

5.

Affidavits of John B. Scofield, Jon D. Ross, and James B. Smith, all dated March 27, 1984, setting forth these fees and expenses, totalling $6,233.27, were previously filed herein. Copies of these affidavits are attached hereto, and made a part hereof, for the Court's convenience.

MOTION TO FIX AMOUNT OF APPELLATE SANCTIONS

6.

Made respondents on this motion are Chambers and the defendant-appellant, Mabel Christine Baker (Baker), Trustee of the Facility Trust.

7.

On August 6, 1986, the United States Court of Appeals for the Fifth Circuit, in a *per curiam* ruling from the bench, declared the appeal on the merits prosecuted by Chambers, CTR, and Baker to be frivolous; imposed appellate sanctions against those parties in the form of the attorney's fees incurred by NASCO in conjunction with that appeal, and double costs; and remanded the case to this Court with instructions to fix the amount of those sanctions. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, No. 86-4003 (5th Cir. Aug. 6, 1986) (*per curiam*) (unpublished Order); *see also id.* (5th Cir. Aug. 11, 1986) (*per curiam*) (unpublished Order amending Order of August 6, 1986); *Id.*, (5th Cir. Aug. 27, 1986) (*per curiam*) (unpublished opinion affirming decision of this Court on the merits).

8.

The allegations of Paragraph 3, above, are adopted and incorporated herein.

9.

NASCO will submit to the Court evidence of its costs and attorney's fees by affidavit, or in such other form as may be ordered by the Court.

MOTION FOR SANCTIONS

10.

This motion is urged pursuant to the inherent equitable powers of this Court, the provisions of 28 U.S.C. sec. 1927 and Fed. R. Civ. P. 11, and the mandate of the United States Court of Appeals for the Fifth Circuit in *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, No. 86-4003 (5th Cir. Aug. 27, 1986) (*per curiam*) (unpublished opinion). *See also id.* (5th Cir. Aug. 11, 1986) (*per curiam*) (unpublished Order); *id.* (5th Cir. Aug. 6, 1986) (*per curiam*) (unpublished Order).

11.

Made respondents on this motion are:

(a) Chambers;

(b) Baker;

(c) A. J. Gray III (Gray), formerly counsel of record for Chambers and CTR in this matter;

(d) Gary L. Boland (Boland), formerly counsel of record for Chambers and CTR in this matter;

(e) Edwin A. McCabe (McCabe), formerly counsel of record for Chambers and CTR in this matter;

(f) Richard A. Curry (Curry), counsel of record for Baker in this matter; and

(g) Any other attorneys who have represented Chambers in these proceedings and are determined to be subject to sanctions.

12.

The allegations of Paragraph 3, above, are adopted and incorporated herein.

13.

NASCO seeks an order imposing sanctions upon the respondents, to include the attorney's fees, expenses, and costs incurred by NASCO during the course of these *entire* proceedings, and in the administrative proceedings before the FCC.[1]

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[1] It should be noted that, since NASCO is seeking all of its attorney's fees, expenses, and costs as part of the sanctions which may be imposed by the Court, there will be some overlapping of the compensatory damages sought in conjunction with the contempt proceedings, as well as the sanctions awarded by the Fifth Circuit due to the frivolous appeal.

14.

Chambers and his counsel were given notice by NASCO on Friday, October 14, 1983 that on the following Monday, October 17, 1983, a suit for specific performance, including a motion for a temporary restraining order, would be filed in this Court. Almost immediately thereafter, and before the first pleading was actually filed herein, Chambers and his counsel set in motion an incredible scheme designed to defraud this Court and NASCO. The respondents' plan included simulated sales into a phony trust in an illegal attempt to remove the *res* from the jurisdiction of this Court.

15.

The indelible taint of the initial fraud pervades these entire proceedings, thus rendering sanctionable every step taken thereafter by the respondents, even if some of those steps, standing alone, may appear legitimate. Nevertheless, few, if any, of the actions taken by the respondents following the initial fraudulent scheme were in fact legitimate.

16.

No attempt will be made to recite each and every sanctionable act of the respondents in these proceedings, but for purposes of illustration the following should bear the Court's consideration:

(1) In spite of the temporary restraining order issued by this Court on the early afternoon of October 17, 1983, the respondents

blithely proceeded with the putative sales to Baker.

(2) On October 17, 1983, Gray had *three* conversations with the Court – yet, inexplicably, he never once mentioned that the acts sought to be enjoined were even then being carried out.

(3) The leaseback of television properties from Baker to CTR was in direct violation of the temporary restraining order dated October 17, 1983, and the temporary restraining order and preliminary injunction issued on October 24, 1983.

(4) Chambers and CTR were held in contempt by this Court for refusing to comply with the Court's order that NASCO be permitted access to the books and records of CTR. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115 (W.D. La. 1984).

(5) Chambers and his attorneys filed two meritless and untimely appeals of the Court's contempt judgment. *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, 752 F.2d 157 (5th Cir. 1985) (dismissal of appeal as of right from judgment of contempt); *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, No. 84-9037 (5th Cir. May 29, 1984) (unpublished opinion) (denial of permission to prosecute interlocutory appeal from judgment of contempt). Significantly, the contempt judgment was not appealed following this Court's final judgment on the merits.

(6) Chambers and CTR filed numerous meritless pleadings, virtually all of which were adjudicated adversely to them by the Court. These pleadings were not well

grounded in fact or in law and were filed for the improper purpose of delay and needlessly increasing the costs of this litigation.

(7) On October 24, 1984, after these proceedings had been pending for more than a year, the respondents filed an amended answer and frivolous counterclaims alleging that *NASCO* had breached the contract. This necessitated NASCO filing extensive responsive pleadings, engaging in – as it developed – needless discovery, and ultimately filing a successful motion for summary judgment on the counterclaims.

(8) The respondents scheduled numerous unnecessary depositions, including those of *all* of the members of the Board of Directors of NASCO, as well as representatives of NASCO's New York banker, Manufacturer's Hanover Trust.

(9) The respondents persistently attempted to expand the issues of the lawsuit well beyond the bounds of reason in an action which the Court itself labeled on several occasions as "a simple lawsuit."

(10) Throughout these proceedings, the respondents constantly sought delays of discovery, hearing dates, and of the trial date itself because Chambers supposedly had more important things to do.

(11) After these proceedings had been underway for well over sixteen months, and after the respondents had filed two of their motions for summary judgment (that period being replete with exhaustive and exhausting dilatory tactics), the respondents filed a ridiculous motion to have the

trial judge recused. That motion was a classic violation in every way of Rule 11. That motion required NASCO to conduct extensive legal research, prepare and file a lengthy and detailed response, and to expend considerable time in preparing for and participating in the hearing itself.

(12) Following the denial of the respondents' baseless motion for recusal, the respondents petitioned the Fifth Circuit Court of Appeals for a writ of mandamus, which caused NASCO to spend extensive hours responding thereto. Baker took advantage of her technical status as a respondent to file an "answer" to the writ application which, in fact, joined with Chambers and CTR in urging the disqualification of the trial judge. The Fifth Circuit found no merit whatsoever to the recusal issue and ordered its dismissal. *In re Calcasieu Television and Radio, Inc. and G. Russell Chambers*, No. 85-4124 (5th Cir. Feb. 28, 1985) (unpublished opinon).

(13) The meritless motion for recusal and the petition for mandamus to the Fifth Circuit Court of Appeals achieved for the respondents the desired result of once again postponing the trial of the case on its merits.

(14) The respondents listed no less than 100 witnesses in their version of the pretrial order, requiring NASCO to depose a number of those listed. Those depositions revealed that none of the listed witnesses had any relevant information. In fact, only two of the listed witnesses actually appeared to testify at the trial of the case on April 17, 1985.

(15) After putting NASCO through the traces for so many months, the respondents on the eve of trial stipulated that the August 9, 1983 Purchase Agreement was a valid and enforceable contract, thereby implicitly admitting that all of the affirmative defenses and counterclaims previously filed by them were meritless.

(16) Subsequent to the Court's decision on the merits granting specific performance to NASCO, Chambers and his counsel, ever dauntless, again sought to disturb the *status quo ante litem* by petitioning the FCC for a permit to construct and relocate the station transmission facilities. This petition made it necessary for NASCO to prepare a motion for civil contempt sanctions, or in the alternative, a motion for additional injunctive relief.

(17) In conjunction with their frivolous appeal to the Fifth Circuit Court of Appeals, the respondents sought a stay of this Court's judgment of specific performance at every level of the federal judiciary, each being unsuccessful.[2]

(18) In a rare, if not unprecedented, move, the Fifth Circuit rendered its decision from the

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[2] *See* Ruling of this Court entered December 22, 1985 and *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, No. 86-4003 (5th Cir. Jan. 22, 1986) (unpublished opinion) (denial of stay pending appeal). Chambers and CTR also applied to the Honorable Byron R. White, as Circuit Justice, for a partial stay of this Court's judgment pending appeal and an application for certiorari to the Supreme Court of the United States. That application, too, was denied. *See In re Calcasieu Television and Radio, Inc. and G. Russell Chambers v. Nasco, Inc.*, No. A-611 (White, J., in chambers, Feb. 18, 1986) (unpublished opinion).

bench affirming this Court's decision *in toto* and assessing sanctions against the respondents. *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, No. 86-4003 (5th Cir. Aug. 27, 1986) (*per curiam*) (unpublished opinion).

(19) While their frivolous appeals were still pending, the respondents continued their disdain for the legal process by launching a badfaith attack opposing NASCO's application for the license transfer with the FCC – all in direct violation of the contract and the orders and judgment of this Court. Once again, NASCO was forced to prepare and file with this Court a motion for civil contempt sanctions including a supporting memorandum and affidavits. Additional discovery, including numerous depositions, was also necessitated.

(20) In support of their opposition to NASCO's application to the FCC for the transfer of the license, officers of CTR filed with the FCC documents which were produced at the depositions of the representatives of Manufacturers Hanover Trust. The production and exhibiting of these documents was in flagrant violation of the strict protective order issued by this Court (consented to and signed by Gray) and a protective order issued as well by the United States District Court for the Southern District of New York (consented to and signed by McCabe).

(21) The respondents steadfastly refused to heed this Court's judgment of specific performance and refused to cooperate in the closing of the sale, forcing NASCO to file a motion on July 1, 1986 seeking judicial assistance and/or supervision in consummating the sale, and seeking further assistance in insuring that all of the assets which NASCO had contracted to purchase were in fact conveyed.

(22) The three-day hearing on NASCO's motion for judicial assistance was remarkable in demonstrating that the respondents had not gained even a modicum of respect for this Court or the judicial system: CTR's accountant and two of its officers gave blatantly false testimony concerning the assets; a phony lease scheme involving seventeen fraudulent leases was uncovered; and on the advice of McCabe, a large block of television equipment – the very same assets which were the subject of the hearing – was removed from service in the dark of night.

(23) In July 1986, this Court issued an order setting the closing of the sale for August 26, 1986. The Court issued reasons for this order on August 1, 1986, and on August 7, 1986 an extensive memorandum opinion was issued by the Court. This was met by another frivolous motion by the respondents--a motion to vacate not only the July order, but also the final merits judgment itself.

17.

The closing itself was contentious, painful, and laborious. It was complicated by Chambers' refusal to meet with representatives of NASCO, necessitating the ferrying of extensive documents, and the multitudinous changes therein, back and forth to Chambers' home.

18.

During the preparations for the posttrial phase of the lawsuit dealing with delay damages, Chambers was once again uncooperative – refusing to supply documents, and thereby requiring NASCO to again seek assistance from the Court. Initially, Chambers demanded payment of an exorbitant sum of money to produce the documents, necessitating the filing by NASCO of a motion to compel production. This was resolved without the necessity of a court hearing, but Chambers insisted that the documents be inspected only at his offices. The documents were inspected during the summer months of 1987, with representatives of NASCO being permitted to inspect them only in a room without air conditioning or ventilation,[3] and only at times convenient to Chambers (but greatly inconvenient and costly to the representatives of

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[3] Once, when NASCO's representatives returned from Nashville to Lake Charles to resume the document inspection after having been forced to leave because Chambers had more important business, they found that someone had thoughtfully installed a thermometer in the room so that they could *see* how hot they were.

NASCO). During the many days consumed by this document inspection, Chambers denied the representatives of NASCO access to a telephone.

19.

NASCO has not been privy to the decision making process which occurred between Chambers and his attorneys, and which resulted in the sanctionable misconduct. At this stage, therefore, NASCO will not attempt to definitively sort out the fault as between Chambers on the one hand, and his many attorneys on the other.

NASCO will submit that the sanctions sought herein should be assessed against Chambers and his attorneys, *in solido*, and that the Registry Funds now on deposit with this Court should be dedicated to the payment of those sanctions.

WHEREFORE, NASCO asks:

(1) That an order issue herein in accordance with the Contempt Judgment of March 23, 1984, fixing the attorney's fees and expenses incurred by NASCO in conjunction with the contempt proceeding in the principal amount of $6,233.27, and directing Chambers to pay that sum, with legal interest from the date of that order until paid;

(2) That, after all due proceedings, an order issue herein fixing the attorney's fees and double costs incurred by NASCO in conjunction with the respondents' appeal to the United States Court of Appeals for the Fifth Circuit, and directing Chambers and Baker to pay that sum, with legal interest from August 6, 1986 until paid.

(3) That an order issue herein directing the respondents to show cause, if any they have, why sanctions should not he imposed against them pursuant to the inherent equitable powers of this Court, the provisions of 28 U.S.C. sec. 1927 and Fed. R. Civ. P. 11, and the mandate of the United States Court of Appeals for the Fifth Circuit, for all attorney's fees, expenses, and costs incurred by NASCO for these entire proceedings, and for the proceedings before the FCC, with legal interest thereon from an appropriate date to be determined by the Court until paid.

(4) That an order issue herein directing NASCO to submit evidence of its fees, expenses, and costs in affidavit form, or in such other form designated by the Court.

(5) That, after all due proceedings, an order issue herein imposing sanctions against the respondents, Chambers, Baker, Gray, Boland, McCabe, and Curry, *in solido*, and directing them to pay, *in solido*, all attorney's fees, costs, and expenses incurred by NASCO in the proceedings before this Court and the FCC.

(6) That such further orders and decrees issue as may be necessary in the premises to effect full redress of NASCO's injuries and full vindication of the sanctity and integrity of the judicial process.

By its attorneys,

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JON D. ROSS
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BY: /s/ Aubrey B. Harwell Jr.
AUBREY B. HARWELL, JR.
BY: /s/ Jon D. Ross
JON D. ROSS

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Lake Charles, LA 70602
(318) 433-9436

BY: /s/ John B. Scofield
JOHN B. SCOFIELD

BY: /s/ David L. Hoskins
DAVID L. HOSKINS

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NASCO, INC., Plaintiff,	)	Civil Action No. CV83-2564
v.	)	
CALCASIEU TELEVISION AND RADIO, INC., et al., Defendants.	)	

AFFIDAVIT

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

James B. Smith, being first duly sworn, states the following:

1. I am a director of the plaintiff, Nasco, Inc., and this Affidavit is submitted pursuant to the directives of the Court set forth in its ruling and judgment entered in this cause on March 23, 1984, on Plaintiff's Petition for Contempt.

2. As plaintiff Nasco, Inc.'s representative, I participated in the preparation for the hearing on December 22, 1983, before this Honorable Court on plaintiff's Petition for Contempt. I testified on behalf of plaintiff Nasco, Inc. at the December 22, 1983, hearing and travelled to Louisiana from Nashville, Tennessee, for that hearing. After the hearing was completed, I flew back to Nashville from Louisiana.

3. I spent a total of two and one-half days preparing for the December 22, 1983, hearing, participating in that hearing, and travelling to and from Louisiana for that hearing.

4. My compensation from plaintiff, Nasco, Inc., came to $875.00 for the two and one half days spent in preparing for, participating in, and travelling to and from the December 22, 1983, hearing before this Honorable Court on Plaintiff's Petition for Contempt.

5. Plaintiff Nasco, Inc., also paid out of pocket expenses in the amount of $604.27 for my lodging, air fare, meals, and other expenses incurred in connection with my attendance at that hearing.

/s/ James B. Smith
JAMES B. SMITH

Sworn to and subscribed before me this 27th day of March, 1984.

/s/ Illegible
Notary Public

My Commission Expires:

4-22-86

Respectfully submitted,

NEAL & HARWELL

By: /s/ Jon D. Ross
Aubrey B. Harwell, Jr.
Jon D. Ross

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Lake Charles, LA. 70602
(318) 433-9436

Counsel of Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Affidavit was served upon Mr. A. J. Gray, III, Counsel for Defendant Calcasieu Television and Radio, Inc., and G. Russell Chambers, and Mr. Richard Curry, Counsel for Defendant Mabel Christine Baker, by depositing a copy of same in the first-class mail with postage prepaid, this 27th day of March, 1984.

/s/ Jon D. Ross

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NASCO, INC., Plaintiff,	)	Civil Action No. CV83-2564
v.	)	
CALCASIEU TELEVISION AND RADIO, INC., et al., Defendants.	)	

AFFIDAVIT

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Jon D. Ross, being first duly sworn, states the following:

1. I am one of the counsel of record for the Plaintiff, Nasco, Inc., in the above-entitled action. This Affidavit is submitted for the Court's consideration pursuant to the directives of this Honorable Court set forth in its ruling and judgment entered in this cause on March 23, 1984, upon Plaintiff's Petition for Contempt.

2. I have carefully reviewed the business records of the law firm of Neal & Harwell to determine the number of hours spent by attorneys in this firm which were directly related to the preparation and filing of Plaintiff's Petition for Contempt and the December 22, 1983, hearing on that Petition.

3. I have determined that Mr. Harwell and I spent a total of three hours in providing legal services to Plaintiff,

Nasco, Inc., in connection with the preparation and filing of Plaintiff's Petition for Contempt and the December 22, 1983, hearing of the Court on that Petition. Plaintiff, Nasco, Inc., has been billed by Neal & Harwell at the rate of $100.00 per hour or a total of $300.00 for such legal services.

/s/ Jon D. Ross
JON D. ROSS

Sworn to and subscribed before me this 27th day of March, 1984.

/s/ Illegible
Notary Public

My Commission Expires:

4-26-86

Respectfully submitted,

NEAL & HARWELL

By: /s/ Jon D. Ross
Aubrey B. Harwell, Jr.
Jon D. Ross

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Counsel of Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Affidavit was served upon Mr. A. J. Gray, III, Counsel for Defendant Calcasieu Television and Radio, Inc., and G. Russell Chambers, and Mr. Richard Curry, Counsel for Defendant Mabel Christine Baker, by depositing a copy of same in the first-class mail with postage prepaid, this 27th day of March, 1984.

/s/ Jon D. Ross
JON D. ROSS

MAR 29 1984

ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

STATE OF LOUISIANA : AFFIDAVIT

PARISH OF CALCASIEU :

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in and for the foregoing parish and state, personally came and appeared JOHN B. SCOFIELD, who, after being duly sworn, declared:

Appearer is the President of Scofield, Bergstedt, Gerard, Mount & Veron, Professional Corporation, and appearer and his firm have been representing NASCO, Inc. in the litigation entitled "NASCO, Inc. versus Calcasieu Television and Radio, Inc.; G. Russell Chambers and Mabel Christine Baker, Trustee for the Facility Trust",

bearing Civil Action No. 83-2564, now pending in the United States District Court, Western District.

Appearer has carefully reviewed the records of the firm to ascertain the fees and expenses which were incurred as a result of the refusal of Calcasieu Television and Radio, Inc. and G. Russell Chambers to permit the examination of the general ledger and the 1982 income tax returns of Calcasieu Television and Radio, Inc. These records revealed the following:

Attorney's Time, 43.25 hours at $100.00 per hour	$4,325.00
Trip Expense to Alexandria	104.00
Federal Express charges	25.00
Total	$4,454.00

It was not possible to determine precisely from costs attributable to this matter such as copying charges, long distance telephone expenses and paralegal and secretarial time and, therefore, these items are not included.

/s/ John B. Scofield
JOHN B. SCOFIELD

SWORN TO AND SUBSCRIBED before me, Notary, on this 27th day of March, 1984.

/s/ Virginia E. McKnight
NOTARY PUBLIC

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4702
Summary Calendar

D.C. Docket No. CV 83 2564

NASCO, INC.,

Plaintiff-Appellee,

versus

CALCASIEU TELEVISION AND RADIO, INC., and RUSSELL CHAMBERS,

Defendants,

and

RICHARD A. CURRY,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Louisiana

Before Reynaldo G. GARZA, WIENER, and BARKSDALE, Circuit Judges.

JUDGMENT

(Filed Sep. 13, 1991)

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

September 13, 1991

ISSUED AS MANDATE:

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(2)

NO. 91-1021

Supreme Court, U.S.
FILED
JAN 9 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD A. CURRY,
Petitioner

Versus

NASCO, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF IN OPPOSITION

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*Counsel of Record

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

RICHARD A. CURRY,
Petitioner

Versus

NASCO, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Amicus Curiae

*Counsel of Record

January 3, 1992

Come now the movants, David L. Hoskins of the law firm of Scofield, Gerard, Veron, Hoskins & Soileau, and Jon D. Ross of the law firm of Neal & Harwell, formerly counsel for the respondent, NASCO, Inc. (NASCO), in this cause, and as officers of this Court move the Court pursuant to Sup. Ct. R. 37 for permission to file a brief amicus curiae in opposition to the petition for writ of certiorari filed in this cause by the petitioner, Richard A. Curry.

As grounds for this motion, the movants would respectfully show to the Court the following:

1. The movants formerly represented NASCO in this matter, and did so from the filing of suit until the present stage of these proceedings. NASCO has now advised the movants that NASCO does not wish to be further involved in these proceedings, and has directed the movants not to file a brief on behalf of NASCO in opposition to the pending petition for writ of certiorari.

2. In its judgment of January 23, 1989, imposing sanctions, including the six-month suspension from practicing before the Western District of Louisiana that is now challenged on this petition, the district court directed that "[o]n appeal, NASCO's counsel is to defend the entire judgment of this Court, including sanctions other than attorney's fees and expenses." *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120, 137 n.10 (W.D. La. 1989), Pet. App. at A-40 n.10. By Order dated February 16, 1989, the district court reiterated that directive. On June 25, 1990, the district court entered an Order in conjunction with the proceedings on remand again directing counsel for NASCO to act as counsel for the Court in conjunction with the sanctions proceedings until such time as

the sanction rendered against the petitioner has been resolved with finality. The movants have fulfilled the district court's directive to defend the sanction imposed against the petitioner through the remand proceedings in the district court and two appeals to the United States Court of Appeals for the Fifth Circuit, and are prepared to do so before this Court.

3. The movants believe that, for the reasons set forth in the amicus curiae brief attached hereto, the pending petition for writ of certiorari should be denied. The movants, because of their long involvement in these proceedings, are intimately familiar with the facts and the law applicable to this case, and are uniquely situated to properly brief the issues presented to this Court by the pending petition. In light of the stated intention of NASCO not to address the pending petition for certiorari, this Court will not have the benefit of any argument in opposition to the granting of certiorari unless this motion is granted.

4. Undersigned counsel has contacted Robert G. Pugh, counsel for the petitioner, Richard A. Curry, and has obtained written consent on behalf of the petitioner to file a brief amicus curiae in opposition to the pending petition. NASCO, however, has not consented.

ACCORDINGLY, and because this Court should have the benefit of a brief in opposition to the granting of certiorari in its determination whether to grant the petition, the movants respectfully request that this motion be

granted, and that they be permitted to file the attached brief amicus curiae.

Respectfully submitted,

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BY: _____
DAVID L. HOSKINS
*Counsel of Record

Counsel for Amicus Curiae

QUESTIONS PRESENTED FOR REVIEW

1. Whether this case, in which the district court utilized its well-established inherent power to suspend from practicing before it an attorney who abused the court's processes, warrants review on certiorari to "clarify" the relationship between Rule 11 and the inherent power where (1) the sanctioned attorney failed to raise this issue in his original appeal and subsequently withdrew it at oral argument on his appeal after remand, and (2) the conduct for which the attorney was suspended does not fall wholly within the reach of Rule 11.

2. Whether this case, in which the sanctioned attorney was afforded prior notice of his substandard conduct, two full evidentiary hearings, and two appeals, warrants review on certiorari to "elucidate" the due process protections available to attorneys faced with the possibility of an inherent power sanction.

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COUNTERSTATEMENT OF THE CASE

Richard A. Curry petitions this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. He seeks to overturn that court's affirmance of his six-month suspension from the rolls of the Western District of Louisiana. The respondent herein, NASCO, Inc. (NASCO), has no desire to involve itself in this proceeding. This brief in opposition is respectfully submitted by NASCO's former counsel as Amicus Curiae.

A. *The Nature of the Case*

The challenged sanction arose out of a diversity action to enforce a contract for the sale of a television station in Lake Charles, Louisiana. NASCO was the buyer. The sellers were Calcasieu Television and Radio, Inc. (CTR) and G. Russell Chambers, CTR's sole shareholder and director. When Chambers caused CTR to breach the contract, NASCO sued to enforce it.

Despite the absence of any colorable basis in fact or in law, Chambers, his codefendant, Mabel Christine Baker, and their attorneys, A.J. Gray III, Edwin A. McCabe, and Richard A. Curry, aggressively resisted NASCO's suit with a campaign of fraudulent, dilatory, and abusive conduct designed to thwart the rendering of meaningful relief by the district court. That campaign began with a deliberate act of fraud on the day Chambers received notice of the impending suit, and continued unabated for nearly three full years. NASCO prevailed, but only at great cost.

Ultimately, the district court imposed sanctions against the defendants and their attorneys, including the

six-month suspension at issue in this petition.[1] Those sanctions were affirmed on appeal. This Court granted certiorari with respect to the monetary sanction imposed against Chambers, and affirmed it. Curry now asks this Court to review *his* sanction on certiorari, and to overturn it.

B. *The Factual Context*

The context from which the challenged sanction arises is described in varying degrees of detail in four reported decisions: (1) the district court's original decision on the merits, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 623 F. Supp. 1372 (W.D. La. 1985) [*NASCO I*]; (2) the district court's original sanctions opinion, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D 120 (W.D. La. 1989), Pet. App. A-1 [*NASCO II*]; (3) the Fifth Circuit's opinion on the initial appeals from the sanctions judgment, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990), Pet. App. A-64 [*NASCO III*]; and (4) this Court's opinion affirming the sanctions judgment as to Chambers, *Chambers v. NASCO, Inc.*, 501 U.S. ___, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991), Pet. App. A-111 [*NASCO IV*].

Amicus adopts the factual findings set forth in those decisions as its counterstatement of the factual context of this case.

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[1] Monetary sanctions were imposed against Chambers. Baker was reprimanded. Gray was disbarred from the Western District and prohibited from applying for readmission for three years. McCabe was severely reprimanded and declared ineligible to practice in the Western District for five years. The sixth respondent, Gray's cocounsel, Gary L. Boland, was not sanctioned.

C. *The Proceedings Below*

The Fifth Circuit affirmed the district court's merits judgment in a *per curiam* ruling from the bench at oral argument. That court rejected the Public Records Doctrine arguments urged by the appellants as "singularly unconvincing" and "disingenuous," and held that their appeals were "manipulative," "completely frivolous," and "brought for the sole purpose of delay." *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, No. 86-4003 (5th Cir. Aug. 27, 1986) (*per curiam*) (unpublished opinion affirming judgment on the merits). Accordingly, that court imposed sanctions against Chambers, CTR, and Baker pursuant to Fed. R. App. P. 38, and remanded the matter to the district court with instructions to fix the amount of the appellate sanctions, and to determine whether further sanctions should be imposed against the defendants and/or their counsel for the manner in which the case was conducted in the district court. *Id.*

On April 11, 1988, the district court held an evidentiary hearing on the sanctions issue. All parties, including Curry, submitted briefs and participated in that hearing to the extent they deemed appropriate.

In December 1988, the district court issued a Minute Entry noting that the range of sanctions under consideration included the possible suspension or disbarment of culpable counsel, and invited additional memoranda on that issue. All parties, except McCabe, submitted briefs.

On January 23, 1989, the district court rendered judgment imposing sanctions, including Curry's six-month suspension. *NASCO II*, 124 F.R.D. 120, Pet App. A-1.

Amicus takes exception to Curry's assertion that

"[t]he sanctioned activity consisted only of pleadings filed by Curry. . . ." Petition, p.3. That is simply not the case. Curry was sanctioned for his participation in "an illegal and fraudulent scheme and conspiracy . . . designed to place the operating properties of CTR beyond the reach and jurisdiction of [the district] Court through the medium of the Louisiana Public Records Doctrine and to deprive NASCO of its rights to specific performance. . . ," *NASCO II,* 124 F.R.D. at 125, Pet. App. at A-11, and in a subsequent "campaign of harassment, oppression, and delay," 124 F.R.D. at 144, Pet. App. at A-58, which the district court called "as classic an example of vicious, deliberate, deceitful, fraudulent and sanctionable conduct as the Courts can produce," 124 F.R.D. at 142, Pet. App. at A-53.

The district court found that both Curry and his client, Baker, had played their roles in this "modern counterpart" of "trial by ordeal." *Id.*

Baker, "in all her acts, was under the complete control of Chambers." *NASCO I,* 623 F. Supp. at 1380. She "exhibited no discretion of her own," she showed "no fiduciary responsibility in her acts as trustee," she simply performed "any act or acts directed by Chambers without question and without consideration of why." *Id.* at 1381. She was "indispensable to the success of the conspiracy and the Public Records Doctrine defense in particular. She was the unfailing tool of [Chambers] and performed his every request without inquiry or question." *NASCO II,* 124 F.R.D. at 132-33, Pet. App. at A-29.

Curry, too, "was vital to the fraudulent Public Records Doctrine defense, and valuable to the harassment tactics of Gray and Chambers." 124 F.R.D. at 133, Pet. App. at A-30. He became "intimately familiar with [the initial fraud upon the court] through instruction, the record

and depositions," yet nevertheless "brazenly and deliberately urged upon [the] Court as uncontroverted fact, the attempted simulated and fraudulent sale to the Trustee Baker which [he] knew was fraudulent and was attempted for the sole purpose of depriving NASCO of its rights to specific performance." 124 F.R.D. at 128, Pet. App. at A-17. Hired by Gray "to assist and defend the Public Records Doctrine defense," 124 F.R.D. at 133, Pet. App. at A-29-30, Curry's "sole responsibility was to assure that [Baker] remained the unfailing tool of her brother." *Id.*, Pet. App. at A-30.

It was for his role in embracing that fraudulent defense and in participating in the campaign of harassment and oppression that Curry was suspended.

Following the rendition of judgment, Curry moved for reconsideration by the active judges of the Western District sitting *en banc.* When that request was denied, Curry appealed.

The Fifth Circuit affirmed. *NASCO III,* 894 F.2d 696, Pet. App. A-64. The court rejected Curry's due process arguments, concluding that he "had adequate notice of the charges and [was] allowed to present a defense to each one of them at the hearing." 894 F.2d at 707, Pet. App. at A-87. The court further concluded that the sanction was supported by express findings of bad faith and improper motivation amply supported by "clear and convincing evidence." 894 F.2d at 708, Pet. App. at A-89. "There is," the court said, "no dispute that the appellants [including Curry] did everything the district court said they did." *Id.*

On Curry's petition for panel rehearing, however, the Fifth Circuit remanded the matter for reconsideration. Noting Curry's protestations that his conduct was not

sanctionable, that he did no more than sign a minimal number of pleadings, and that he did not have an adequate opportunity to defend himself at the initial hearing, the Fifth Circuit instructed the district court on remand to "allow Curry to offer any relevant argument and evidence he may have," and to then "reinstate, supplement, or change its present findings and any ordered sanctions as it finds appropriate." Pet. App. at A-93. In so doing, the appellate court found no error of fact or law, found no abuse of discretion, and did not reverse or vacate the original judgment. It merely gave Curry a second bite at the evidentiary apple: "We do not hold that the imposed sanction was an inappropriate response to the district court's perception of Curry's role. Curry seeks a further opportunity to dispel that perception. We do no more than allow him to do so, perhaps out of an excess of caution." *Id.*

The district court then held an evidentiary hearing on July 6, 1990. At that hearing, the court permitted Curry to adduce such evidence as he saw fit. That evidence, however, was neither "uncontradicted" nor "uncontested," as he would suggest. Petition, p.6. To the contrary, Curry's evidence did not differ in substance from the evidence he adduced at the original hearing, and it was very much contradicted by the record, by the conduct of the defendants and their counsel throughout the course of the litigation, and by the logically inevitable inferences to be drawn therefrom.

On August 18, 1990, the district court reinstated its original findings and conclusions, and confirmed the sanction originally imposed, noting that it had "considered the arguments and evidence produced by Curry," but had found "nothing in the documentary evidence or in the testimony of witnesses Curry and Fornias or in the closing argument at the July 6, 1990 hearing which would have

even a slight effect" on its original findings. Pet. App. at A-100.

After a second attempt to secure *en banc* review or reconsideration by the active judges of the Western District, Curry again appealed.

Again, the Fifth Circuit affirmed. Pet. App. A-164. The appellate court concluded that the district court did not misinterpret its instructions on remand, Pet. App. at A-169-70, and rejected the reiteration of Curry's argument that his sanction was unsupported by evidence, Pet. App. at A-170-71. Declining to review and reevaluate the prior panel's holding that the district court's original findings were supported by clear and convincing evidence, and noting the limited nature of the remand, the appellate court found no abuse of discretion, and no error, in the district court's reinstatement of the sanction. Pet. App. at A-171. Finally, the appellate court rejected Curry's contention that the district court's reference to the Louisiana Rules of Professional Conduct was improper, erroneous, or violative of due process. Pet. App. at A-171 n.4.

Curry now seeks certiorari in an attempt to overturn the sanction imposed against him.

SUMMARY OF ARGUMENT

The petition for certiorari should be denied.

This case presents no necessity for "clarification" of the relationship between Rule 11 and the inherent power. Curry failed to raise this issue in his original brief on appeal from the initial sanctions judgment. He withdrew it at oral argument on his appeal after remand. He has thus failed to preserve it for review. Beyond that, his argument that such

a clarification is necessary is based on a fundamental misapprehension of the proceedings below. He was not sanctioned for a mere violation of the certification requirements of Rule 11. He was sanctioned for knowingly embracing and participating in an abusive defense strategy predicated in fraud and designed to thwart the judicial resolution of NASCO's claims.

This case presents no occasion for "elucidation" of the due process protections available to an attorney facing the possibility of inherent power sanctions. In truth, Curry seeks no such "elucidation." He argues only that *he* did not receive the process due him at the hands of the lower courts: Fair notice, and an opportunity to be heard. That argument is predicated upon a mischaracterization of the proceedings below. Curry received due process. He had fair notice of the substandard conduct for which he was ultimately sanctioned, and he had two full evidentiary hearings and two appeals at which to present his defense. Due process requires no more.

REASONS FOR DENYING THE WRIT

This case presents no "special and important reasons" warranting review on writ of certiorari. Sup. Ct. R. 10.1.

Curry argues that this Court should grant certiorari (1) in order to "clarify" the relationship between the inherent power and Fed. R. Civ. P. 11, and (2) in order to "elucidate" the due process protections available to attorneys facing the possibility of an inherent power sanction.

Neither of those questions should be decided by this Court. The first was not preserved for review, and in any

event is not presented by this case. The second is based on a mischaracterization of the proceedings below, and amounts to little more than a complaint of evidentiary errors by the lower courts.

A. *Rule 11 and the Inherent Power*

Curry first suggests that certiorari should be granted because this case "squarely presents" a question pretermitted both by the Fifth Circuit in affirming the original sanctions judgment, and by this Court in affirming that judgment as to Chambers: Namely, whether a federal district court may invoke its inherent power to sanction conduct that falls wholly within the ambit of Rule 11.

But that question is not "squarely presented" by this case.

1. *Curry failed to preserve that question for review.*

To begin with, Curry has failed to preserve that question for review.

He did not raise it in his original brief on appeal from the district court's sanctions judgment.[2] He *could* have done so, for that argument in no way derived from the proceedings on remand. His failure to do so foreclosed his raising it on the appeal after remand. *E.g., United States v. Fiallo-Jacome,* 874 F.2d 1479, 1481-82 (11th Cir. 1989); *Northwestern Indiana Telephone Co., Inc. v. FCC,* 872 F.2d 465, 470 (D.C. Cir. 1989); *Walnut Properties, Inc. v. City of Whittier,* 861 F.2d 1102, 1106 (9th Cir. 1988); *Eli Lilly and*

[2] Curry first raised that issue in his petition for rehearing on the original appeal—even then too late. *United States v. Richards,* 646 F.2d 962, 963 (5th Cir. 1981).

Co. v. Home Ins. Co., 794 F.2d 710, 716-17 (D.C. Cir. 1986); *Brooks v. United States*, 757 F.2d 734, 739 (5th Cir. 1985).

Beyond that, Curry expressly withdrew and waived that issue at oral argument on his appeal after remand.[3] Pet. App. at A-168 n.2. As a result, it was not orally argued by either side, and was not decided by the lower appellate court.

Having not been raised and considered in the appellate court below, that issue should not be considered by this Court on certiorari. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277, 109 S. Ct. 2909, ____, 106 L. Ed. 2d 219, 239 (1989).

2. *The misconduct for which Curry was sanctioned does not fall wholly within the ambit of Rule 11.*

Curry's suggestion that this case necessitates a clarification of the relationship between Rule 11 and the inherent power is based on a fundamental misapprehension of the proceedings below: That he was sanctioned for misconduct falling wholly within the reach of Rule 11.

He was not.

Curry was not sanctioned for merely failing to conduct the reasonable inquiry required by Rule 11, or for some other violation of the Rule's certification requirement. He was sanctioned for knowingly embracing and

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[3] Curry suggests that the Fifth Circuit "overstated" his concession in withdrawing this issue at oral argument below. Petition, pp. 14-15. That is simply incorrect. Curry did exactly what the Fifth Circuit says he did. He withdrew his argument that the district court was required to utilize Rule 11, and not the inherent power, to sanction Curry, and that issue was not addressed further by either side.

participating in a systematically abusive defense strategy predicated in fraud and designed to thwart the *judicial* resolution of NASCO's claims. *NASCO II*, 124 F.R.D. at 125, Pet. App. at A-11.

That conduct was "contrary to professional standards," and "inimical to the administration of justice." *In re Snyder*, 472 U.S. 634, 635, 105 S. Ct. 2874, ____, 86 L. Ed. 2d 504, 513 (1985). It flouted those duties that lie at the very core of the privilege of practicing law—the duty of integrity and honest dealing with the court, the duty to litigate in good faith, the duty to yield to the orderly processes of justice. *See* Louisiana State Bar Association Code of Professional Responsibility, D.R. 10-101(A)(4), D.R. 7-102(A)(3), (A)(5), (B); *id.*, D.R. 1-102(A)(5), D.R. 7-102(A)(1), (A)(2); *id.*, 1-102(A)(5), (A)(6).

That at some points along the continuum of his involvement his conduct may have also violated Rule 11's certification requirements can in no way diminish the inherent power of the court which admitted him to suspend him from practicing before it. *NASCO IV*, 501 U.S. at ____, 111 S. Ct. at ____, 115 L. Ed. 2d at 47-49, Pet. App. at A-129-32. The district court, in its informed discretion, expressly concluded that Rule 11 was not up to the task at hand. *NASCO II*, 124 F.R.D. at 138-39, Pet. App. at A-42-44. Like the misconduct of Chambers, "much of the bad-faith conduct [by Curry] . . . was beyond the reach of the rules"; the "course of [that] conduct . . . evidenced bad faith and an attempt to perpetrate a fraud on the court"; and the conduct arguably sanctionable under Rule 11 was "intertwined with conduct only the inherent power could address." *NASCO IV*, 501 U.S. at ____, 111 S. Ct. at ____, 115 L. Ed. 2d at 49, Pet. App. at A-131.

In sum, Curry's misconduct at most intersects the

perimeter of Rule 11 tangentially. It certainly does not fall wholly within the reach of the Rule, and most certainly does not present, squarely or otherwise, the question Curry would urge this Court to resolve.

B. *Due Process and the Inherent Power*

Curry next suggests that certiorari should be granted because it is necessary for the Court to "elucidate" the due process protections available to litigants and lawyers who face the possibility of inherent power sanctions.

But this case presents no "special and important reasons" for undertaking such an "elucidation"—and Curry offers none. Indeed, the only "elucidation" Curry urges is that due process requires fair notice and an opportunity to be heard before the sanction of suspension can be imposed. Hardly a novel proposition.

In truth, Curry does not ask this Court to "elucidate" anything. He asks only that the Court determine whether *he* received the process due him at the hands of the courts below.

That question—a matter of interest only to Curry—is not the stuff of certiorari. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502, ____ S. Ct. ____, 95 L. Ed. 479, 482 (1951) (certiorari is granted only in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties, and in cases where there is real and embarrassing conflict of opinion and authority between circuit courts of appeal).

Be that as it may, it is clear that Curry was afforded all the process due him in these proceedings.

1. *Curry received fair notice of the conduct for which he was sanctioned.*

Curry complains he did not receive fair notice of the contract for which he was ultimately sanctioned. That is simply not true.

Curry was served with a fourteen page sanctions motion, supported by a thirty-six page memorandum of authorities. Some seven pages of the motion, and some fifteen pages of the memorandum, were devoted to setting forth the factual basis for the sanctions sought against the respondents, including Curry. Curry was served with a sixteen page memorandum in opposition to his motion to strike the claims for sanctions against him. Seven pages of that opposition were devoted to detailing his misconduct. Curry was served with the district court's Minute Entry of December 12, 1988, setting forth the specific legal basis for the sanctions under consideration, notifying all parties that the court was considering disciplinary sanctions (including disbarment) against counsel, and soliciting additional memoranda on that issue. The sanctionable conduct occurred in the very litigation in which sanctions were sought, and the proceedings were based in large measure upon the existing record. Curry had full knowledge of that record. *NASCO II,* 124 F.R.D. at 141 n.11, Pet. App. at A-49 n.11. The district court issued a twenty-five page published opinion setting forth the factual and legal bases for the sanctions imposed—including the sanction against Curry. On appeal, Curry was treated to yet another, albeit more truncated, recitation of the legal and factual bases for the sanction imposed. That was notice.

Curry took that cumulative notice with him to the hearing on remand in the district court. And, as the district court observed, *that* hearing, preceded by *that* notice, must at the very least have "laid to rest the issue of due process." Pet. App. at A-97. Certainly, it must lay to rest

Curry's suggestion that "[n]o Court has afforded [him] a written statement of how the specific acts by Curry . . . was [*sic*] sanctionable or merited suspension from practice." Petition, p.24.

Curry would nevertheless suggest that the district court's reference to violations of Louisiana's Rules of Professional Conduct—without prior notice that ethical violations were at issue—was itself a violation of due process.

That suggestion is frivolous.

Courts suspending attorneys have generally done so in response to conduct that is "contrary to professional standards" or "inimical to the administration of justice," as described in the "case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct." *In re Snyder,* 472 U.S. 634, 645, 105 S. Ct. 2874, ____, 86 L. Ed. 2d 504, 513 (1985). The rules cited by the district court do embody "the lore of the profession" insofar as acceptable professional conduct is concerned, and do reflect the standards of professional conduct that were applicable at the time of Curry's representation of Baker.

Simply put, Curry's conduct fell far short of those accepted standards of conduct which embody the dual obligations to his client and to the judicial system that are inherent in his role as an officer of the court. *See In re Snyder, supra,* 472 U.S. at 644-45, 105 S. Ct. at ____, 86 L. Ed. 2d at 512-13. In citing the Rules of Professional Conduct, the district court did nothing more than point that out.

There is nothing talismanic in that citation. It was not the citation to those rules that formed the basis for the sanction imposed against Curry. It was his *conduct*—

conduct that was professionally substandard, and inimical to the administration of justice, by any measure.

In sum, given the remand in fact granted by the Fifth Circuit, Curry cannot now be heard to complain that he had inadequate notice of either his conduct or the potential sanctions that he faced. Certainly, he cannot suggest he had no notice that this conduct was substandard—particularly in light of the district court's extremely blunt language in its original sanctions opinion. *E.g.*, *NASCO II*, 124 F.R.D. at 143, Pet. App. at A-54 ("The attorneys who engineered this mockery are a disgrace to the profession.").

Curry had notice. He knew suspension was at stake. He knew what conduct was at issue. He knew that conduct had been found substandard by the district court. And he had ample opportunity to utilize that knowledge in preparation for two full evidentiary hearings.

2. *Curry had ample opportunity to be heard in his own defense.*

Curry complains that he did not have an adequate opportunity to be heard, either in the district court or in the appellate court below.

This amazing assertion comes after two full evidentiary hearings in the district court, and two appeals.

Curry contends that the remand hearing was defective because the district court mistakenly believed the sanction was already final and therefore did not really consider the evidence adduced. The appeal after remand was defective, he says, because the appellate court improperly declined to look behind the prior panel's affirmance of the district court's original factual findings, and failed to find

an abuse of discretion in the face of the district court's "erroneous view of the law" and "clearly erroneous assessment of the evidence."

Curry received a full evidentiary hearing in the district court on NASCO's initial sanctions motion. Following that hearing, the district court made detailed findings of fact as to Curry's misconduct, and on that basis imposed the sanction here challenged. The district court imposed that sanction "only after serious consideration based on unimpeachable and weighty evidence and a definite conviction that [the sanction was] necessary and appropriate under the circumstances in which the sanctioned acts were performed." *NASCO II*, 124 F.R.D. at 142, Pet. App. at A-52. The district court's factual findings were affirmed by the lower appellate court on the basis of "clear and convincing evidence." *NASCO III*, 894 F.2d at 708, Pet. App. at A-89.

Any question of the adequacy of that initial hearing and appeal for due process purposes is doubtless mooted by the appellate court's subsequent remand for reconsideration after a second evidentiary hearing.

In its remand, the appellate court directed the district court to "allow Curry to offer any relevant argument and evidence he may have," and thereafter to "reinstate, supplement or change" the original findings and sanction "as it finds appropriate." Pet. App. at A-93. "We do not hold," the appellate court was at pains to stress, "that the imposed sanction was an inappropriate response to the district court's perception of Curry's role. Curry seeks a further opportunity to dispel that perception. We do no more than allow him to do so, perhaps out of an excess of caution." *Id.*

On remand, the district court did exactly what it was instructed to do. It scheduled a hearing. It accepted briefs from Curry urging that the sanction be vacated. It admitted, without limitation, all the evidence Curry offered. It permitted Curry's counsel to argue orally that the sanction should be vacated. It then took the matter under advisement, "considered the arguments and evidence" adduced by Curry, reconsidered its findings and the sanction imposed, and decided to let both stand. Pet. App. at A-100.

The district court did not, as Curry suggests, refuse to consider the evidence he adduced. It simply ruled against him. The evidence he adduced on remand did not differ significantly in substance from the evidence he offered at the original sanctions hearing. For the most part, it consisted of self-serving testimony and affidavits from the very coconspirators whose bad faith conduct had provoked sanctions in the first place. Those witnesses were no more credible, and their evidence was no more persuasive, on remand than at the original hearing. And the district court gave that evidence precisely the weight it deserved.

The district court's remarks about the "finality" of the sanction at the beginning of the remand hearing were nothing more than an absolutely accurate statement that the appellate court had found no error of law or fact, and had not reversed or vacated the original sanctions judgment—it had merely given Curry a second "opportunity to dispel" the district court's perception of his role in the bad faith defense of the underlying lawsuit. Pet. App. at A-93. Indeed, the original sanction, and the findings on which it was based, were expressly affirmed. The district court did no more than point that out, noting that the issue was whether, in light of the evidence adduced on remand, Curry's conduct warranted a six-month suspension from practice—and *not* the validity of the sanction or the

propriety of the court's initial use of its inherent power. A point which Curry's counsel readily conceded:

> MR. PUGH: Yes, Your Honor, I am aware of the fact. Of course, you did [impose] the sanctions and that they were affirmed by the Appellate Court. What we would like to do with the Court's permission is review what Mr. Curry did in the hopes that the Court might reconsider what it did and if possible recall the sanctions as against Mr. Curry.

Transcript of Remand Hearing, p.5.

On appeal, the Fifth Circuit reviewed the evidence adduced on remand and rejected Curry's argument that "the record does not support the . . . findings made in the . . . original sanctions opinion." Pet. App. at A-170. Noting the prior panel's conclusion that those findings were supported by clear and convincing evidence, and the limited nature of the remand, the appellate court declined "to review or re-evaluate" the prior panel's opinion, and found no abuse of discretion by the district court based on its review of the remand record. Pet. App. at A-171.

The appellate court was correct in that action. *See, e.g., Brooks v. United States*, 757 F.2d 734, 739 (5th Cir. 1985) (second appeal generally brings up for revision nothing but proceedings subsequent to mandate following prior appeal); *compare United States v. Camou*, 184 U.S. 572, 574, 22 S. Ct. 505, 506, 46 L. Ed. 694, 695-96 (1902) (second writ of error brings up for revision only proceedings subsequent to initial mandate).

In sum, Curry had a fair hearing. He had two fair hearings. And two fair appeals.

His contentions that he did not receive due process are meritless.

CONCLUSION

This case does not warrant review on certiorari.

The district court's inherent power to regulate and control attorney conduct, and to suspend an attorney for deliberate abuses of the judicial process derives from the attorney's role as an officer of the court which granted him admission. That power is well established, and is of ancient origin. *In re Snyder,* 472 U.S. 634, 643, 105 S. Ct. 2874, ____, 86 L. Ed. 2d 504, 512 (1985); *see Ex parte Garland,* 4 Wall 333, 378-79, 18 L. Ed. 366, 370 (1867); *Ex parte Burr,* 9 Wheat 529, 531, 6 L. Ed. 152 (1824).

That power was properly exercised in this case. The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David L. Hoskins, a member of the Bar of this Court, hereby certify that I received a copy of the Petition For Writ of Certiorari on December 13, 1991, and that three copies of the Amicus brief in opposition to the petition for writ certiorari were mailed, first class postage prepaid, to Mr. Michael H. Rubin, Rubin, Curry, Colvin & Joseph, Ninth Floor, One American Place, Baton Rouge, Louisiana 70825, and Mr. Robert G. Pugh, Pugh, Pugh & Pugh, Commercial National Tower, 333 Texas Street, Suite 2100, Shreveport, Louisiana 71101-5302, counsel for the petitioner, and to Mr. Dennis Meaker, General Counsel, NASCO, Inc., 27 North Main Street, Springfield, TN 37172.

I further certify that all parties required to be served have been served.

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